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1092

No. 2958.

IN THE  
**CIRCUIT COURT OF APPEALS**  
OF THE  
**UNITED STATES**

1092

**Ninth Circuit.**

UNITED STATES OF AMERICA,  
*Plaintiff and Respondent,*  
VS.

SOUTHERN PACIFIC COMPANY,  
et al.,  
*Defendants and Appellants.*

IN EQUITY.

**APPELLANTS' BRIEF UPON THE FACTS.**

GUY V. SHOUP,  
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JOSEPH H. CALL,  
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**Filed**

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Clerk.







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patent was issued to the railroad company; that at the time of the issuance of such patent no oil had been discovered upon any of the land patented, or any of the intervening sections, the nearest oil well at that time being at Mc-Kittrick, four miles west from the land in suit nearest thereto and ten miles away from some of it. . . . . 4-29

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**APPELLANTS' BRIEF UPON THE FACTS.**

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STATEMENT OF THE CASE

This is an appeal by the Southern Pacific Company, Southern Pacific Railroad Company and the other defendants, from a final decree entered August 9, 1915, by the United States District Court, Southern District of California, Northern Division, cancelling and annulling a patent issued by the United States on December 12, 1904, to the Southern Pacific Railroad Company for 6109.17

acres of land in *Township 30 South, Range 23 East*, M.D.M., California, as lands inuring to said railroad as indemnity under the act of Congress of July 27, 1866, and joint resolution of Congress of June 28, 1870.

The bill alleges in substance, that the defendant railroad company selected said land as non-mineral land and fraudulently concealed, from the Government, the mineral character of said land and fraudulently represented to the Government, in its application to select and in a non-mineral affidavit accompanying it, that said lands were not mineral lands and were of the character contemplated by the said grant; that, in fact, said lands contained rich and valuable deposits of mineral, all of which facts were then known to said railroad company; that said statements were made for the purpose of deceiving the Government and inducing the issuance of a patent for said lands; that the Government believed said statements and acted upon them and was induced, thereby, to issue the patent in question; that the Government was induced, thereby, to omit to make any examination, investigation or inquiry as to the true facts and as to the mineral or non-mineral character of said lands.

The answer of the Southern Pacific Railroad Company and of the other defendants puts in issue all material allegations of the bill. The answers admit and allege that these lands were duly and legally selected by the railroad company and were



regularly and legally patented to the railroad on December 12, 1904.

The evidence in this case is voluminous. The evidence was taken before a special examiner; hence, the judge of the District Court heard none of the witnesses personally and was obliged to base his decision upon the typewritten record of more than ten thousand pages. Upon this appeal this record has been reduced to a printed record of three thousand nine hundred and two pages. To anyone who had not personally participated in the trial, such a record might well seem so formidable as to preclude the hope that any review thereof would lead to any clear understanding of the controlling facts.

If, however, appellant's views are correct, the material facts in this case are not obscured by any conflict of testimony. Such facts are either undisputed or have been established by the uncontradicted evidence. When they have been made clear to this Court, the unimportance of the details as to which there is a conflict of opinion will, if appellant's views are correct, become apparent and the rules of law that should govern in the disposition of this case will likewise be obvious.

It is our purpose then to state at the outset the facts which the record shows are not disputed or have been clearly established by the testimony, particularly with reference to the situation as it existed at the time the patent here involved was applied for by the appellant Southern Pacific Rail-

road Company (November 14, 1903) and at the date of its issuance by the Government to the railroad company (December 12, 1904). If this patent was procured through fraud on the part of the railroad company, such fraud must have been practiced before the issuance of patent on December 12, 1904.

What happened after the patent issued is, of course, immaterial except in so far as it may tend to throw light upon the knowledge and intent of the parties prior to the issuance of the patent.

This brief deals primarily with the facts established by the evidence. The legal propositions involved will receive only incidental reference as they will be more extensively discussed in a separate brief entitled "Appellants' Points and Authorities".

## I.

The facts admitted or established beyond dispute show that from the earliest days the lands in suit were used only for grazing purposes, and that it was not until the discovery of oil in the Kern River field near Bakersfield in May, 1899, thirty miles to the east of the nearest lands in suit, that any attention was paid to the lands in suit as oil lands; that although these lands were thereupon plastered with so-called locations by speculators, none of them ever sunk a well or erected a derrick or discovered any oil upon any of the lands; that when the railroad

company, four and a half years later, selected these lands under its grant from the United States, the government sent a special agent into the field who reported that, after a careful examination, he found no indications of oil or other mineral; that, thereupon, the government required the railroad company to publish notice of its application with a description of the land for eight weeks in a daily newspaper in that vicinity; that this was done and, there being no protest from anyone, a patent was issued to the railroad company; that at the time of the issuance of such patent no oil had been discovered upon any of the land patented, or any of the intervening sections, the nearest oil well at that time being at McKittrick, four miles west from the land in suit nearest thereto and ten miles away from some of it.

The patent covers about six thousand acres of land situated in certain odd-numbered sections in Township 30 South, Range 23 East, Mount Diablo Meridian, in a range of hills known as the Elk Hills, in Kern County, California. This range of low hills is about seventeen miles long and about six miles wide. These hills are separated from the Temblor Range by narrow valleys and small intervening ranges of hills, the most important of which are the Buena Vista Hills. The Elk Hills approach within a few miles of the Temblor Range at the westerly end but at the easterly end they



are about twelve miles away from the main range. That is, the Elk Hills are not strictly parallel to the Temblor Range.

The lands in suit are alternate odd-numbered sections of land lying within the indemnity limits of the grant made by act of Congress July 27, 1866, and joint resolution of June 28, 1870, pursuant to which the railroad company constructed the railroad contemplated by such grant and became entitled to the alternate odd-numbered sections of land within the limits of the grant as therein provided.

The McKittrick, Midway and Sunset oil fields, as now developed, lie along the base of the Temblor Range from four to fifteen miles south and west of the lands now sued for.

While a great deal of the surface of the Elk Hills is too broken for ordinary farming operations, it was shown by the evidence that they were valuable for grazing for both sheep and cattle and had been used for that purpose at least as far back as 1874. (Tr. 121, 191-2, 249, 265, 1982, 2112) At the time this suit was tried the railroad company had leased for grazing purposes about seventy thousand acres of grazing lands, including the lands in suit, for which it received an average rental of about four cents an acre. (Tr. 1697)

The nearest well to any of the lands in suit prior to the issuance of patent was at McKittrick, four miles away. (Plffs. Ex. O) This was put down in

1899, (Tr. 170) but the present oil development started in the Kern River field where the first well was brought in during May, 1899. (Tr. 495) This well was twenty-five or thirty miles from the nearest lands here in suit. (Tr. 141, Pl. Ex. O) During the ensuing excitement it appears that men in every walk of life, spurred on by dreams of sudden wealth and without knowledge of the habits of oil or the difficulties to be overcome in attaining it, rushed eagerly into schemes to locate lands anywhere in Kern County. Many of these, of course, made speculative locations of pretended oil claims in the Elk Hills beginning immediately after the discovery of oil in the Kern River field and continuing for a few years after that until the excitement had died down. A large number of these claims were filed in the office of the County Recorder of Kern County. Not one of them was entitled to record under any statute of this state and not one of them was an oil location because of the lack of any discovery. An analysis of these supposed locations shows that they were piled on top of each other three and four deep on portions of the land and that they were constantly being abandoned by one set of speculators and "relocated" by another set. The Government introduced the testimony of more than twenty witnesses showing that these locations had been made, yet not one of these witnesses could say that he knew there was a pint of oil in the Elk Hills. Not one of

them ever tried to drill for oil with the exception of the witness F. D. Lowe, who claimed that about 1901 he had drilled to a depth of 560 feet in the southeastern part of these hills, many miles from the lands in suit, where he had found a few drops of oil "strolling down" the drill when it was removed from the well. (Tr. 150) Even he and his associates abandoned this place. In 1910 a well was drilled near the location of the Lowe well to a depth of 4850 feet without finding the least trace of oil. (Tr. 1795)

The largest group of claims in the Elk Hills was that located by H. A. Blodget, N. C. Farnum and others. These people had at least fifty square miles under location in that vicinity. According to N. C. Farnum they located everything that was not patented in Townships 30-23, 30-24, 31-23 and 31-24. (Tr. 501) He said that they relocated these claims from time to time. When they made their original locations they employed twenty-five or thirty men to stake out their claims, says Farnum, "because there were several trying to do the same thing, and as a general proposition we got ours first. We saw to that." (Tr. 503) The witness W. G. Sylvester testified that he and several others started out from Bakersfield to make some locations beyond McKittrick during this excitement in 1899, but concluded to locate in the Elk Hills because they came to them first and thought that they would do just as well. (Tr. 359) He



was anxious to locate as many claims as possible but found that a man named Packard was also there. Packard had the advantage as his men were on horseback and, therefore, could run out the lines and set up notices much quicker than Sylvester could. Also, according to Sylvester, Packard had an unfair advantage as he had his notices already made out. (Tr. 356-7, 359.)

Sylvester was a dentist, Packard was the marshal of Bakersfield, Farnum was a brick maker, and practically all of the other locators of these speculative claims were men without experience in the oil business. (Tr. 257, 358-9) A few competent oil men were also probably carried along by the wave of enthusiasm, but, as a rule, they realized the uncertainties of untried territory and therefore confined their activities close to the main range, where prior development in certain localities had shown the presence of oil in commercial quantities. W. G. Sylvester testifies that during this excitement a great many competent oil men came into that country but that they did not go into the Elk Hills. (Tr. 360)

It is a common saying in a mining country that more money is to be made from the sale of "prospects" than can ever be taken out of the ground. This is particularly true in the oil business because of the readiness of the uninitiated to believe that oil may be found anywhere in the vicinity of certain supposed "indications" such as shale,

outcrops, "seepages", etc. We are therefore not surprised to find among these locators in the Elk Hills a number of men, such as Blodget, Farnum and others, who were obviously interested only in the possible sale of these speculative claims to outsiders.

Farnum testified that between 1900 and 1903 he arranged to have a great many people look over these claims in the Elk Hills and that he actually did succeed in getting a "man named Bartlett" to consider leasing some of these claims. This deal was not consummated, according to Farnum, because Bartlett learned of the withdrawal order. (Tr. 505) As the withdrawal order had no application to mineral claims, it is more probable that the deal fell through because of the unpromising character of the land. There could be no doubt that these energetic speculators did their best to unload some or all of their claims onto some of the many men who came into that country with more money than experience. Their uniform lack of success indicates that even the "tenderfeet" were unwilling to look at the Elk Hills.

H. A. Blodget was associated with wealthy men (Tr. 380) but he does not seem to have been able to interest any of them in the Elk Hills. He was himself a large operator but was too wise to spend his own money in sinking a test well. He did attempt to persuade R. K. Howk to put up the money for such a well but Howk declined after

looking at the land. Howk says that Blodget *may* have thought the oil sands extended beneath the Elk Hills, but, he significantly adds, Blodget "didn't put any money in it. He thought there was a possible chance. It was deep land." (Tr. 1864) Blodget himself admits that he directed his own operations toward *known* territory and that he then regarded the Elk Hills as totally *unknown*. (Tr. 395)

During the six years they held these claims, or a part of them, they spent \$20,000 for location work and in other ways. They did the assessment work on perhaps a quarter of the claims, according to Farnum, and relocated them from time to time in the hope that they might be able to interest someone in leasing the land and developing it. (Tr. 521) He further says that they maintained possession by keeping a man or two on the ground. (Tr. 503) And Farnum also admits that during all this time there was no discovery made on any one of these "claims." (Tr. 514)

Blodget and his associates were apparently the only people who attempted to hold their claims for any length of time. It is not possible to here review all of the testimony concerning other similar locations. The interesting thing about them is that in practically every instance the locators contented themselves with putting up and recording their notices. They rarely went back again or made any effort to induce others to go in with them. Some



of them did make such an effort. W. G. Sylvester, for instance, tried to get someone to drill on the land but without success. He says, "I presume they considered it wildcatting to go in there." (Tr. 357) The Blodget and Farnum interests had more money and more claims than anyone else. They could, therefore, afford to hold on to their speculative venture longer.

The witness Farnum testifies to the expenditure of \$20,000 on these claims and from other witnesses it appears that there was twice that amount spent in all in digging holes, making roads, erecting monuments and in doing various other things claimed to be either location or assessment work. The speculative and insincere character of these claims is shown by the fact that not one cent of this money was spent in an actual effort to develop oil. For more than ten years after these claims were first located not a derrick was erected or a drill stuck in the ground by any of these locators. *In fact none of these men ever did attempt to find oil in the Elk Hills.* The drilling which began there in 1910 was done by men who had no connection with these early locators or with their "locations."

The witness Farnum says that it was the "firm determination" (Tr. 511) of himself and associates to drill a test well in the Elk Hills. But their acts at that time belie this statement. They then had an available drilling rig near at hand and not in

use, which Farnum says they intended to move into these hills. (Tr. 503.) According to him the sole reason they did not do so was because the government had "withdrawn" the land in 1900. (Tr. 510, 520.) But, inasmuch as this government withdrawal affected only *agricultural* entries (Tr. 1558), it is apparent that their real reason for not drilling in the Elk Hills was something else. The withdrawal order did not prevent them from starting a well at that time on Section 26, Township 30-22, *close to McKittrick*, on land which they held under mineral locations, although it was a matter of official record that this Section 26 was within the same withdrawn area.

A. T. Lightner, a witness for the defense, testified that in 1903 he was engaged in the abstract business at Bakersfield and was associated with a man named Brown in making locations in the Elk Hills and elsewhere. Lightner looked up the records to discover vacant lands or claims on which the assessment work had not been done and Brown induced various persons to employ him to locate these lands for them for a small compensation. Many of these claims were located in the Elk Hills on ground which had lapsed because of the abandonment of earlier claims. Many people were induced to go into this mildly speculative venture. No work was done by any of them on these "locations" and it was Lightner's opinion that none of them had ever seen the land. (Tr. 1997-8) One of

the men whom Brown thus induced to lend his name was Timothy Spellacy, a prominent operator in the Midway Field, and in the court below counsel for the government endeavored to argue that Mr. Spellacy actually located these claims himself. The significant fact in this connection is that neither Spellacy nor any of the other practical oil men in that region did go into the Elk Hills.

Lightner frankly admitted that these claims were purely speculative and were located without any idea whether the lands contained oil or not.

There was, it is true, testimony to the effect that these locations were influenced by the existence of a "seepage" in Section 32 of Township 30-24, to the east of the lands in suit, and upon "asphalt indications" in the railroad cut at the west end of the hills. It will be later pointed out that neither one of these supposed "indications" has any connection with the oil in the Elk Hills. The alleged "seepage" is not a seepage at all and the asphalt found near the railroad cut is float washed down from the vicinity of McKittrick. But, however this may be, the entire history of these early locations is convincing evidence that not one of them was made in good faith. They were made simply in the hope that because of the excitement attendant upon the discovery of oil in the Kern River field, five miles away, the locators of these claims might be able to dispose of their so-called locations at



some profit and without any risk to themselves. Not a single discovery of oil was made by any of them. Not one of them ever tried to drill for oil with the exception, already stated, of the witness Lowe who claimed that he had drilled to a depth of 560 feet, many miles from the lands in suit, where he had found a few drops of oil on the drill when it was removed from the well. (Tr. 150) Even he and his associates abandoned this place.

The excitement attendant upon the discovery of oil in the Kern River field in May, 1899, attracted the attention of the Government. On February 28, 1900, the Commissioner of the General Land Office suspended from agricultural entry about nine hundred square miles of land in the vicinity of the California oil fields, including the lands in suit. (Exhibit QQQ Tr. 1524) They were suspended from agricultural entry "upon allegations that the same contained deposits of mineral (oil)" Tr. 1555)

Later in the same year the Department at Washington requested advice whether this general withdrawal order should be modified. In response to this request, Jay Cummings, a special agent of the General Land Office, made a confidential report, dated July 13, 1900. (Tr. 3868-77) It does not directly refer to the lands in the Elk Hills but does report on lands in the township where McKittrick is situated. It contains an enthusiastic and even extravagant description of the oil possibilities of the

entire southern end of the San Joaquin Valley, saying that petroleum might be expected to be found in "fabulous quantities" within the withdrawn lands.

It is quite probable that other subsequent reports of the same character were made by Cummings. He states in the report that it is his intention to make other reports. S. P. Wible testifies that Cummings was in and out of McKittrick for three or four years and that as a result of his reports the withdrawal was canceled as to some of the land in 1902 or 1903. (Tr. 331)

On November 14, 1903, C. W. Eberlein, who had become the acting Land Agent of the Southern Pacific Railroad Company a few months earlier, filed a selection list or application for the lands now in suit. This was more than four years after Farnum and others had made the so-called locations already mentioned. These lands had been surveyed in the preceding year (Tr. 107) but the plat of this survey was not filed in the local land office until May 16, 1903. (Tr. 3761) Accompanying this selection list was an affidavit by Eberlein, dated November 7, 1903, in which he stated that these lands were "not interdicted mineral or reserved lands, and are of the character contemplated by the grant", and that he had "caused the lands selected \* \* \* \* to be carefully examined by the agents and employees of said company as to their mineral or agricultural character and that to

the best of his knowledge and belief none of the lands returned in said list are mineral lands." (Tr. 3754) Eberlein testified that he made this affidavit on information furnished him by his assistant George A. Stone, who was a land grader for the company who had been in its employ for many years, and who told Eberlein that he was familiar with the lands. (Tr. 1137) Stone testified that he was familiar with these lands from having been frequently in that country for two years preceding the selection, although he did not make a special examination for the purposes of this selection. (Tr. 1029) The affidavit of Eberlein follows the form prescribed by the Government itself in the Regulations of July 9, 1894. (19 L. D. 21)

This selection list was promptly rejected by the Government because the lands were within the withdrawal of February 28, 1900. (Tr. 1159-60)

An appeal was at once taken by the railroad company from the rejection of this list. (Tr. 3865) In the letter of the law department of the railroad company of December 9, 1903, notifying Eberlein that the appeal had been taken, it was suggested that a *hearing* might be had before the local land office to determine the character of this land. This indicates that there was nothing to conceal so far as the railroad company was concerned. But it seems that prior to that time the Government had inaugurated the system of having specific tracts of land examined by its own agents



to determine whether they contained oil or not, in place of a hearing. This appears from the letter of D. A. Chambers, Washington attorney for the railroad company, to Wm. F. Herrin, dated December 16, 1903. (Tr. 1483) Such examinations were not made particularly for the railroad company but seemed to be generally made whenever any sort of an agricultural patent was applied for within the withdrawn area. (See letter, Commissioner Richards to Register and Receiver, August 18, 1903) (Tr. 1513)

Because of this system of special examination by its own agents which the Government had established, D. A. Chambers, as attorney for the railroad company, on November 30, 1903, wrote the Commissioner of the General Land Office requesting that such an examination be made of the lands now in suit, (Tr. 1544) and on December 10, 1903, he was advised by the Commissioner that a special agent had been instructed to examine and report on them. (Tr. 1482)

The direction to examine these lands was sent to E. C. Ryan, a special agent of the General Land Office, a son of the Assistant Secretary of the Interior and subsequently Chief of the Field Division of the General Land Office at Los Angeles. As shown by official correspondence in evidence, Ryan had made a number of other similar examinations prior to that time but not relating to the lands in suit. The letters directing the examination of the

lands now in question were dated October 23, 1903, and December 10, 1903. In the first letter, which describes only a portion of these lands, the Commissioner said: "It is alleged by the railroad company that the tracts above described are in fact non-mineral in character. You are, therefore, directed, in the regular order of business, to proceed and examine the lands in question and thereafter submit report to this office, stating whether or not, in your opinion, the same should be relieved from suspension." (Tr. 1542-3) The second letter directed a similar examination of lands not included in the first letter and requested a special examination and report on them, together with those described in the first letter. This second letter also spoke of a more general examination remaining to be made of all the lands then under suspension. (Tr. 1547)

On January 22, 1904, E. C. Ryan reported to the Commissioner on this special examination, saying: "I have the honor to report that on January 10th, 11th, 12th, 13th and 14th, I made a careful examination of the lands in question and found no oil seepages, oil springs, surface or other indications of oil or minerals of any kind that would tend, in my opinion, to warrant said lands being classed as mineral in character, and I respectfully recommend that they be relieved from suspension." (Tr. 1550) A part of the lands referred to in this report are not involved in this suit, but the

evidence shows that not more than two days were devoted to the examination of these outside lands. (Tr. 1970)

When this report was received in the Land Office, it was endorsed, "Report as to the mineral (oil) character of certain lands" etc. (Tr. 1551) This shows that it was considered to be a determination of the character of these lands, at least so far as the opinion of the government's own agent was concerned. It received official recognition as being such a determination by the letter and order of the Commissioner of the General Land Office to the local land office at Visalia, dated February 11, 1904, in which this statement is made:

"I am now in receipt of a report from a Special Agent of this office who has examined \* \* \* \* \* (describing the lands), and who states that a careful examination thereof failed to disclose any oil seepages, oil springs, surface or other indications of oil or minerals of any kind that would tend to warrant the lands being classed as mineral. He recommends that the same be relieved from suspension. The statements made in the Special Agent's report are not controverted by the records of this office and it would appear that during the period of nearly four years which has elapsed since said suspension, any persons interested in the mineral development of the lands have had ample opportunity to explore and develop the same." (Tr. 1556)



This letter concluded with a formal order relieving the lands from suspension. Another letter, dated February 20, 1904, returned the rejected selection list with the statement "that said application to select may now be granted, if no other objection thereto exists." (Tr. 1557) This was a definite statement that the mineral question was considered closed. These letters were public documents open to anyone. They were intended to be an official declaration and determination that the lands in question were not oil lands and that they were open to selection by the railroad company under its grant. Whether or not Ryan was a competent observer of the character of these lands is immaterial. The Government selected him, trusted him to make the examination, relied on his report when he said that these lands were not oil lands, and officially declared to the world its acceptance and adoption of his conclusion.

When the order of the Commissioner of the Land Office relieving these lands from suspension on the ground that they had been found, after a *careful* examination, not to be oil lands, was filed in the local land office, it came to the attention of the railroad company. Eberlein testified that he never saw Ryan or had any communication with him and that, as far as he knew, Ryan was in no way influenced by anyone connected with the railroad. He testified further that after he learned of the lifting of the suspension order, he knew that the Government

had itself actually investigated the character of this land and felt that its action had "backed up the non-mineral character of that land entirely." (Tr. 1162-3)

On February 26, 1904, acting under the directions received from the Commissioner, the local land officers regularly filed the selection list. (Tr. 3767) As some of the selected lands were within six miles of a known mining claim as shown by the records of the General Land Office, the railroad company was required to publish notice of its application for patent. (Tr. 3860-1) This notice was published in fifty-two successive issues of the Bakersfield Morning Echo, beginning on April 14, 1904. (Tr. 3859) This notice specifically described the lands applied for and called for protests against the application by anyone who thought that the lands were mineral. (Tr. 3860) The Morning Echo was a paper of general circulation in Kern County at that time and it is a very significant fact that no protests were filed against this selection by any one of the numerous speculative locators, who had claims on these lands, although a number of them admitted that they subscribed to and read this paper at that time. (Tr. 407)

Subsequent to the completion of this advertisement, some questions were raised in the General Land Office concerning the proper technical description of some of the selected lands, and also as to the sufficiency of some of the base lands in

lieu of which the lands in suit were being selected as indemnity. These were purely formal matters not in any way concerning the question of the character of the land. (Tr. 3771) In order to meet the objections raised by the Government to the form of the selection list, an amended or "re-arranged" list was filed on September 6, 1904. (Tr. 3772) Attached to this list was an affidavit, sworn to by Eberlein, of August 31, 1904, identical with the non-mineral affidavit attached to the original list filed by him the preceding November. (Tr. 3850) Another identical affidavit, sworn to by Eberlein on June 20, 1904, was also introduced in evidence from the files of the General Land Office, but without any explanation of a reason for its existence. It is probable that it was filed in supposed compliance with the Regulations of July 9, 1894, concerning advertising of selection lists, as it was made immediately after the conclusion of the publication in the Bakersfield Echo.

On December 12, 1904, the Government issued its patent to the Southern Pacific Railroad Company. This patent was duly recorded in the County Recorder's office of Kern County.

At the time of the issuance of this patent no oil wells had been sunk, or any oil discovered upon any of the lands in suit, or any of the intervening lands. The nearest oil well was four miles away.



Suit to cancel this patent was filed by the Government December 10, 1910, six years after the issuance of the patent.

The foregoing statement of the case is based upon facts that have been either admitted or clearly established by the testimony. There is no conflict of the testimony as to any of the facts in question, except that the Government sought to prove by some witnesses that the land had no value for grazing or agriculture; but the testimony of six other witnesses, including three Government witnesses, clearly shows that the land was actually used for grazing purposes. It is well to pause here and summarize these facts, even at the risk of undue repetition, in order that their significance and controlling importance may not be overlooked or forgotten. It is all the more important that we do this because when we come to consider the circumstances relied upon by the Government we will find ourselves in a realm of conjecture and suspicion clouded with conflicting geological theories and distorted inferences drawn from facts which, in themselves, are perfectly innocent—a realm where every fact consistent with the good faith of those engaged in the issuance of this patent, both on the part of the Government and the railroad company, is either totally ignored or sought to be obscured by innuendo, or by the direct charge of fraud supported only by inference and suspicion.

It is, however, a well established rule that "evidence of whatever description must yield to the extent that it conflicts with the admitted or clearly established facts" (*Moore on Facts*, sec. 7) and the facts that are admitted or have been established beyond peradventure by the evidence in this case show that from the very earliest days the lands here in suit were used only for the grazing of sheep and cattle up to May, 1899; that during all this time they remained in the undisturbed possession of cattle and sheep men, and they so remained until the discovery of oil in the Kern River field in May, 1899; that such discovery was thirty miles from the lands here in suit; that the swarm of speculators who thereupon spread out over all the adjoining territory, plastering the country as they went with their paper locations, included the Elk Hills in their operations but that none of them ever sunk a well, or erected a derrick, or discovered a pint of oil in any of these lands although four years elapsed from the time that they began making their locations before patent was issued to the railroad company; that the Government had withdrawn these lands from entry when the railroad company made its application for patent; that this withdrawal was because of the possibility of oil being found therein; that the Government was as fully advised as to the character of the land at the time the railroad company applied for patent as the company itself, if not more so; and that it refused

to entertain the company's application for patent until it had made a special examination of the lands for the purpose of ascertaining the character of the land; that upon receipt of the report of its agent stating that he had made a careful examination of the lands and found no indications of oil or mineral of any kind that would, in his opinion, warrant the lands being classed as mineral, the Government relieved the lands from the withdrawal order, permitted the company's application to be filed and ordered the notice of such application to be published in fifty-two successive issues of a newspaper published and of general circulation in the vicinity of the land; that this notice, which was published as required, contained a specific description of the land and called for protests against the application by any one who thought that the lands were mineral; that no protests were filed by anyone; and that thereupon, in due course, the patent was issued; that at the time this patent was issued not an oil well had been sunk, or a derrick erected, or any oil discovered, upon a single acre of the land conveyed by the patent, or upon any of the intervening sections; that the nearest oil well then in existence was four miles distant from the nearest land embraced in the patent and ten miles distant from some of it.

The evidence as to the so-called oil locations which were put upon this land immediately after the discovery of oil in the Kern River field was



introduced by the Government. Rightly considered, however, the fact that none of these locators ever sunk or attempted to sink a single well upon any of the lands embraced in such locations, although they had more than four years to do such work before patent was issued to the railroad company, is one of the strongest facts that could be advanced to show that these locators not only did not know that the lands were oil lands but did not believe that they were oil lands. If there had been such belief it is evident that many wells would have been sunk upon these lands within a very short time. This is, indeed, one of the reasons given by the Commissioner of the General Land Office for relieving the lands from suspension. (Tr. 1556)

Yet, we find the Government asserting in its bill of complaint in this case that at the time the railroad company selected this land it fraudulently represented to the Government that the said lands were not mineral lands but were of the character contemplated by the grant; that, in fact, said lands contained rich and valuable deposits of mineral, all of which facts were then known to the railroad company; that said statements were made for the purpose of deceiving the Government and that the Government believed said statements and acted upon them and was induced thereby to issue the patent in question without making any examination, investigation or inquiry as to the true facts

and as to the mineral or non-mineral character of said lands.

When it is remembered that these allegations were made in the face of the admitted facts that the land had been withdrawn from agricultural entry by the Government itself because of its supposed mineral character; that the Government had as much knowledge as to the character of such lands as the railroad company, if not more; that it refused to entertain the railroad's application for patent until it had sent its own special agent in the field to make an examination of such lands and that the patent was issued only after such examination and a favorable report had been made thereon, and after publication of notice of the application and due opportunity given to everyone to protest, it must be evident that the Government's bill was either drafted by counsel entirely unfamiliar with the facts or by someone who had the same point of view as that of Royer-Collard, the French statesman, who boasted of his contempt for facts.

That this latter supposition is correct is, we think, made apparent by the fact that in the argument of this case in the District Court, counsel for the Government insisted that "the Government did not in any way rely upon Mr. Ryan's report as to the character of the lands he examined," but relied upon the non-mineral affidavit of Eberlein!

The burden, of course, rested upon the Government to establish by clear and convincing testimony, first, that the land was in fact valuable for oil at the time of the issuance of the patent; second, that this was known to the railroad company at the time it applied for patent and that Eberlein's non-mineral affidavit was false; and third, that the Government relied upon such affidavit and was deceived thereby.

## II.

While there was a conflict of opinion between the geologists as to the oil possibilities of the Elk Hills, and while the geologists for the Government testified that any expert geologist examining the Elk Hills in 1903 should have known that they contained oil, there was no conflict of opinion upon the fact that it could not be determined at that time, or at any other time, without actual drilling, whether the oil was in sufficient quantity to justify drilling.

In order to establish its claim that the land was in fact valuable for oil and that such fact was known to the railroad company at the time it applied for patent, notwithstanding the absence of any oil discoveries upon or anywhere near the land in suit, the Government introduced the testimony of Arthur C. Veatch, a Government geological expert, and John Casper Branner, a professor of geology at Stanford University.



Mr. Veatch testified that, in his opinion, the Elk Hills were oil land (Tr. 701) and he thought that the oil value of the lands not yet drilled could be demonstrated in the same way that coal can be demonstrated, by the outcrops. (Tr. 701) Mr. Veatch drew an analogy in the mode of study of stratified beds in the case of oil deposits with that of coal. His theory was that the exposures of asphaltum, seepages and oil sands along the Temblor Range for a distance of thirty miles indicated the presence of a broad deposit of oil which would extend half that distance, or fifteen miles, at right angles to the Temblor Range. (Tr. 701-719.) He also stated that if this line of outcrops had been only five miles long he would have fixed the limit of oil territory at a distance of only two and one-half miles. (Tr. 808)

The Temblor Range, it should be borne in mind, is separated from the Elk Hills by narrow valleys and small intervening ranges of hills, the most important of which are the Buena Vista Hills. The Elk Hills approach within a few miles of the Temblor Range, but at the easterly end they are about twelve miles away from the main range.

This theory of Mr. Veatch was, without doubt, constructed for the purpose of endeavoring to bring this case within the ruling in the Diamond Coal case which had been decided in the Circuit Court of Appeals at that time (191 *Fed.* 786) and which was later affirmed by the U. S. Supreme Court

(233 U. S. 236). In this case it was held that the true character of certain alleged coal lands could be determined by the topographic and structural features of adjoining land in which coal was known to be located, regardless of the absence of any physical exposures at the surface upon the lands there in suit. The land there in controversy paralleled the outcrop of the coal for seven miles, the outcrop at the nearest points being only two feet away, the farthest section being about a mile and a half away. Mr. Veatch admitted that he knew of no other geologist who had suggested the application of any such theory to oil formations. (Tr. 810-11)

Professor Branner testified that he had examined the Elk Hills and that his opinion was that the Elk Hills "was the most promising area for petroleum in that region in the vicinity of McKittrick." He formed the opinion that it was oil bearing; (Tr. 1003) but did not think there was any way to determine, from an examination of the surface, how large an area would yield oil at any particular point. (Tr. 1018) He did not regard it as ordinarily possible for a geologist or practical oil man to determine, from the existence of an oil bed at a particular point, that the bed continues for any particular or definite distance in all directions or any direction, partly because the oil comes to an end where it rests on the water; partly because the porous beds are not infrequently

more or less lenticular in form; that is, they may pinch out and come to an end of themselves in that way, by thinning down, or they may be interrupted by breaks so that the beds may be chopped square off. (Tr. 1021-22)

Mr. Ochsner, a witness for the defendants, also criticised the Veatch theory on the ground that it took into consideration only part of the geological story and said that an assumption that because oil is distributed over a number of miles in one direction it must necessarily be found for a number of miles in another direction, was "exceedingly unwise" and, if followed by drilling, might be disastrous. (Tr. 2191-2) Mr. Taff, also a witness for the defendants, declined to accept the theory and objected to it, particularly, because it failed to take into account the peculiar character of the McKittrick anticline (with the accompanying deep syncline between there and the Elk Hills) and disregarded also the fact that the Elk Hills are a more recent uplift. (Tr. 2758-2777-2779)

Mr. F. M. Anderson, another geologist of great experience, and a witness for the defendants, said that there was no warrant for the assumption that oil could be found at a distance of even a tenth of its line of outcrop, as its existence at any place depended upon many other factors besides seepages. (Tr. 2546) As a result of more than ten years' active experience in the study of oil formations in



the California fields, he stated that it was not possible for any geologist, no matter how well qualified, to decide the oil-bearing character of land on the basis of structure alone. (Tr. 2547) A geologist may infer the existence of oil, but the only way to actually determine that it exists, he said, is by drilling. (Tr. 2548-9) This witness frankly admitted that the chief value of a geologist in an undeveloped district is to point out places where oil may *not* be found. (Tr. 2621-2)

Mr. Veatch, however, testified that he would not guarantee to any man going into the Elk Hills that he would get commercial wells. (Tr. 820, 825, 883) He said that while he believed there was a large quantity of oil in the Elk Hills, it could not, in 1904, have been mined at a profit and that the existence of oil in commercial quantities could not be proven without drilling. (Tr. 902)

Professor Branner also testified that in passing upon the character of the Elk Hills he did not determine in any way the quantity of oil and made no attempt to do so. That could only be determined by putting down wells. (Tr. 1007, 1016, 1020)

Mr. F. M. Anderson further testified that he had made many visits into the Elk Hills and vicinity, his first sight of the Elk Hills being early in March, 1903. (Tr. 2381) He details at great length his views as to the geological formation of that territory. His opinion in 1903 and 1904, as the result of his work and examination in that

territory, was that the likelihood of the Elk Hills being then, or ever being, oil territory was negative. (Tr. 2388) He did not believe that they were oil bearing or ever would be found to be oil bearing, at least not in paying quantities. He did not believe those hills contained any commercial deposits of oil at that time and did not so believe at any time later. (Tr. 2388-2454) Mr. Anderson entered the geological department of the Kern Trading and Oil Company in April, 1903. (Tr. 2399) He was in the employ of the land department of the Central Pacific Railway Company for a year or more prior to that time (Tr. 2374); but had left the service of the defendants a year and a half prior to the time the case was tried (Tr. 2585)

Mr. W. H. Ochsner, a consulting geologist, was employed by the Kern Trading & Oil Company, a subsidiary corporation of the Southern Pacific Company, and in 1907 devoted a good deal of work to studying the McKittrick district. (Tr. 2170) His work in that district covered the Elk Hills. He was engaged in working out the geology of the McKittrick field and the relation of the Elk Hills and Buena Vista Hills and the neighboring structures and topography came in as a natural sequence in that study. (Tr. 2171) From the examination he carried on in 1907 he concluded "that the Elk Hills may have small scattering amounts of oil but that they would not be important from an economic sense." (Tr. 2174)

Mr. J. A. Taff, who was also a geologist formerly in the employ of the Government but in the service of the Southern Pacific Company as an assistant geologist and geographist in connection with oil chiefly, (Tr. 2750) began geological work in the McKittrick field in December, 1909, and made a geological examination of the Elk Hills in October and December, 1912, and January, 1913. He made a study to determine for his own satisfaction whether or not the land embraced within the Elk Hills could be called oil land, and concluded that it could not be considered profitable oil land. (Tr. 2751) He gives, as do other witnesses for the defense, at great length, the reasons for his conclusions, which space will not permit us to repeat here.

While there was a conflict of opinion as to the oil possibilities of the Elk Hills, and while the geologists for the Government testified that an expert geologist examining the Elk Hills in 1903 should have known that they contained oil, there was no conflict of opinion upon the fact that, without actual drilling, the quantity of oil to be obtained could not be determined in 1903, or at any other time. All the witnesses are agreed upon this. It should also be noted in this connection that Mr. Veatch's theory that the discovery of an oil bed at a particular point would enable such oil to be traced like coal deposits and its locality elsewhere ascertained, even though there were no surface



indications and even though the distance may be as great as fifteen miles from the locality where it is known, is not only contradicted by every geologist called by the defense but is also contradicted by Professor Branner, who was the only other geologist called by the Government; hence, the preponderance of the evidence upon this point is clearly with the defendants and does not support the finding of the trial court which adopted Mr. Veatch's theory in this respect. Aside from this, however, and assuming that Mr. Veatch's testimony was substantially correct in all respects, it falls far short, for the reasons already stated, of sustaining the Government's contention that the lands in suit were *known* to be *valuable* for oil at the time patent was issued.

The fact is that the most that any geologist can do in passing upon undeveloped territory is to determine whether the structural formation and position of the land is *suitable* for the accumulation of oil. An anticline can be recognized as having the external characteristics of a good reservoir for the accumulation of oil, but there may not be a drop of oil in it. This may be because of any one of a hundred reasons, none of which may be apparent until wells are drilled into the anticline. An anticline, in short, has the same relation to oil that a bucket has to water. The bucket may be empty or filled with something other than water; or, to change the simile slightly, a rain barrel may ac-

cumulate rain water, but there may be no rain, or its access to the barrel may be prevented in many ways. As was said by Professor Branner, one of the government's geologists in this case, the formation of the Elk Hills was, in his opinion, suitable for the accumulation of oil "but that would not necessarily mean that they had accumulated oil. That could be determined only by exploration." (Tr. 1016) And this was the view of Mr. Veatch, the only other geologist called by the Government, who also testified that "oil cannot be proven in commercial quantities without drilling." (Tr. 902)

Taking then, the most favorable view that may be fairly given to the Government's evidence on this point, and disregarding entirely that introduced by the defense, the most that can be said is that a geologist examining the lands at the time the patent was issued would have concluded that they might contain oil, but could have done nothing but guess as to whether they contained sufficient oil to justify the expense of drilling. The entire matter was tersely but accurately stated by Frank Barrett, an oil land prospector, driller and producer, who was also a government witness, when he said that "the true expert is the drill." (Tr. 485.)

May it not then be justly said that even from the government's testimony thus far discussed, the question as to whether the land in suit was *known*

to be *valuable* for oil at the time the patent was issued should be answered in the negative?

### III.

There was no testimony introduced by the government showing that, at the time the patent issued, the lands in suit were known to contain oil in such quantity and at such depth as would render its extraction profitable and justify expenditures to that end, within the rule announced in *Diamond Coal Co. v. United States*, 233 U. S. 236.

The Supreme Court, in the case of *Diamond Coal Co. v. United States*, 233 U. S. 236, took occasion to restate the rule, often laid down before, that an agricultural patent can be canceled on the ground that the land is mineral only by showing by clear and convincing evidence that it was known to contain valuable mineral deposits at the time the proofs were made upon which the patent was issued.

But it is now asserted by counsel for the government that the *Diamond Coal* case has established a new rule to the effect that mere *belief* in the existence of the mineral in the land is enough, regardless of whether or not such mineral exists in *fact*. But a fair consideration of the entire opinion does not support this contention. It was not necessary to the decision of the matter before it that the Supreme Court should change existing rules and the opinion contains no intimation that



any change was intended. The question before it was whether or not the evidence showed that there was *in fact* a valuable deposit of coal known to exist in the lands sued for at the time they were patented. This is shown by the express language of the opinion itself. "We think the evidence, rightly considered," says the court at page 247 of its opinion, "shows with the requisite certainty that at the time of the proceedings in the land office the lands were *known* to be valuable for coal.

\* \* \* \* \* The outcrop, the disclosures in the vicinity, and the geological formation pointed with convincing force to a workable bed of merchantable coal extending under the valley and penetrating these lands." (*Italics ours*)

The present contention of counsel for the government is based upon a portion of the language used by the Supreme Court in the above case on page 239 of its opinion, where the court, in laying down certain propositions of law based on its own prior decisions, says:

"To justify the annulment of a homestead patent as wrongfully covering mineral land, it must appear that at the time of the proceedings which resulted in the patent the land was known to be valuable for mineral; that is to say, it must appear that the known conditions at the time of those proceedings were plainly such as to engender the belief that the lands contained mineral deposits of such quality and in such quantity as would render their extrac-

tion profitable and justify expenditures to that end."

It is obvious from the rest of the opinion that the word "belief" as here used is synonymous with the word *conviction*. It is not used to indicate a mere speculative impression that mineral probably exists. A belief that mineral *may* exist in land, although possibly sufficient to induce a prudent man to prospect the land, is far different from a belief that mineral *does* exist in the land. The Supreme Court, in the quotation given above, was speaking of the latter sort of belief and not of the former, as is shown in the concluding paragraph of its opinion, where it says by way of caution:

"It will be perceived that we are not here concerned with a mere outcropping of coal with nothing pointing persuasively to its quality, extent or value; neither are we considering other minerals whose mode of deposition and situation in the earth are so irregular or otherwise unlike coal as to require that they be dealt with along other lines."

All that the *Diamond Coal* case does in fact decide is that the existence of mineral, as a real thing and not as a speculative possibility, may be proven by evidence of conditions outside the lands sued for, provided the circumstances are so peculiar that such evidence does not leave the matter in doubt.

Belief in the possibility or even probability of mineral deposits being in the land sued for is not

enough. Nor can belief alone (not based on the reality of mineral in the land) justify the cancellation of a railroad patent for the obvious reason that the government is not entitled to equitable relief unless it has in *fact* suffered *damage* by losing something which it was entitled to retain. By the grant of July 27, 1866, Congress gave all odd numbered non-mineral sections within certain limits. Such lands, that is, those which are actually not mineral in character, legally and equitably belong to the railroad company. If a section of such non-mineral land should be erroneously *believed* to be valuable for minerals and for that reason should be restored to the Government by court decree, it would be the duty of the Government to at once re-patent it to the railroad company upon the true situation becoming known. It is therefore the duty of the court, in such a case, to determine whether or not land thus sued for was in fact mineral in character and known to be such at the date it was patented.

It is apparently conceded by counsel for the Government that in 1904 it was not known *as a fact* that valuable deposits of oil existed in the lands now sued for. By what we conceive to be a complete misapplication of the language of the Supreme Court they now claim that the *Diamond Coal* case is authority for holding that belief in the probability of oil deposits in the lands sued for is legally



equivalent to knowledge of the actual existence of such deposits.

But even if we accept their interpretation of the language of the *Diamond Coal* case for the purposes of this argument, they have still fallen far short of making out a case since the facts which they have proven or sought to prove do not show even a belief conforming either in character or extent to that prescribed in the case referred to. It is to be remembered that the Supreme Court, in the portion of the opinion upon which government counsel now rely, stated that this belief must have reference to the quality and to the quantity of the mineral and to whether or not *at the date of the patent* the quantity of the mineral and other conditions affecting it were such as to render its extraction profitable. As we shall now point out, these essential elements are not comprehended within the belief of mineral sought to be proven in the present case.

It is, of course, evident that the belief, or even the fact, that land contains oil is not in itself sufficient to render such land valuable for oil. The depth at which the oil is located and its quantity are equally vital. Even where the oil exists in large quantities, the overlying strata may be so thick as to preclude any hope of its profitable development.

The evidence shows that a well four thousand feet deep, even now, is not a profitable venture unless it turns out to be a tremendously big pro-

ducer. (Tr. 2072.) A well in the McKittrick District 3600 feet in depth would have cost \$60,000 and would have required ten years to pay for itself if it produced continuously one hundred barrels a day at the prices prevailing in 1904. (Tr. 2511.) The average commercial life of a well is five years. (Tr. 2504.) In 1903 and 1904, with the conditions and appliances then known, it was not considered to be a practical matter to drill to a greater depth than 2500 feet, the rotary method of drilling not having been introduced in California at that time. (Tr. 473, 2457-8.)

Realizing the necessity of showing that the *known conditions* of the lands in suit in 1904 were plainly such as to bring them within the requirements of the rule in the *Diamond Coal* case, as interpreted by them, and that the mere fact that oil might be found in these lands was not sufficient, counsel for the government asked their expert geologist, Mr. Veatch, whether, after taking into consideration the state of development of this region before September, 1904, including seepages which certain witnesses had testified to, and the geological structure of the region thereabouts, he, Mr. Veatch, would have advised a company employing him to sell the lands in suit for their agricultural value, and if not, why not. To which Mr. Veatch replied "Certainly not. For the reason of the great oil value of the land. The mineral value is greatly in excess of any agricultural value." (Tr. 716-17)

“Q.—And if your employer were not the owner of the lands in suit, would you, in 1904, with the then present stage of development, and without any exposure of oil seepage or outcroppings in the lands in suit, have advised the acquisition of these lands at a price in excess of their agricultural value? A.—Certainly.” (Tr. 718)

It is apparent that the answer to the first question does not establish the conclusion that any one would be willing to expend any substantial sum of money in developing the oil upon the land, or that Mr. Veatch would have so advised. The testimony of the witness may be literally true in that he, or the owner of the land, might not have been willing to sell the land for its agricultural value, which was, of course, very small, and would have retained it in the hope that because of its oil possibilities he could eventually sell it for more than its agricultural value, and yet not have been willing to spend a dollar of his own money in its development. Likewise, the answer to the second question is equally consistent with the same idea. A great many people would be willing to purchase the land at a price slightly, or even considerably, in excess of its agricultural value, as a speculation, and without the slightest conviction or belief on their part that the land was really valuable oil land.

What counsel should have included in his hypothetical question, and which was carefully omitted therefrom, was the element of expense involved



in extracting the oil. This would in turn have involved the question as to the depth at which the oil was located, and when we come to the cross examination of Mr. Veatch the reason why this was omitted is apparent. Upon cross examination he testified as follows:

“Q. In your opinion then—I am now asking for your belief—there is a large quantity of oil under the Elk Hills?

A. I believe so.

Q. And at what depth?

A. I should say it may be under five thousand feet or it may be over.

Q. In 1904 could it have been mined at a profit?

A. No.

Q. Would it have been mined in 1904?

A. No. But there are a great many valuable mineral deposits that can not be mined at a given moment that are perfectly good mineral lands. \* \* \* I believe the Elk Hills will ultimately be developed into good oil lands.

Q. When?

A. Ultimately.” (Tr. 885-6)

The witness would not, however, hazard any prediction as to when that period would be. It was possible, he said, that it might be within the next ten years. It was possible it might not be for twenty years. When asked if it would be within

the next hundred years he replied, "I think that is very remote." "Q. That is, you think it is safe to say that somewhere in the next hundred years the Elk Hills will be developed? A. Yes; I think they will be developed before a great many coal deposits in the middle west." (Tr. 887-8)

Later this witness also testified:

"Q. By Mr. Lewers—You testified, did you not, that in your opinion whatever oil there might be in the Elk Hills might possibly be four or five or even six thousand feet deep?

A. Yes; that is possible.

Q. And might be even deeper?

A. Yes; there are, I think, some deeper layers.

Q. And in passing upon its value as oil land, on account, possibly, of such great depth, you took into consideration the chances that in the next twenty or fifty or more years means might be found for getting the oil at those depths?

A. I think as a matter of fact means exist now. This depth limit to 5000 feet was fixed before there were wells in California of that depth then. \* \* \* \* \* Now, in the next twenty years I think it is reasonable to think this land will be developed. I would put it much less than fifty years.

Q. You answered the other day that it might not come within fifty years, but it might come in a hundred years.

A. I should say that that is the outside limit. I think the chances of it coming in

twenty years are much greater than its coming at a time longer than fifty years." (Tr. 967-8)

Now it is obvious from this witness's testimony that he could not, or would not, hazard even a prediction as to one of the conditions most essential to a determination of the question as to whether expenditures in developing the oil would be justified; namely, the depth at which the oil was located. That he was of the opinion that it was at such a depth that it could not be mined at the time patent was issued is, however, apparent. The most he could say was that he believed that it might be mined at some very indefinite period in the future. That even this was a mere surmise based upon nothing tangible is shown by his inability, or unwillingness, to even speculate as to the depth of the oil. Is it conceivable that an investor would feel justified in expending large sums of money upon the report of a geologist to the effect that he believed there was a large quantity of oil in certain territory; that it might possibly be four or five or even six thousand feet deep or even deeper; that it could not be mined now, but that it was safe to say that it could be developed within the next hundred years; that the chances of its coming in twenty years were much greater than its coming at a time longer than fifty years? Does evidence of this character establish the known conditions that would plainly en-



gender a belief that would justify such expenditures within the rule which counsel for the government claim was laid down in the *Diamond Coal Company* case? Is it evidence that would support a finding in a court of law that the land containing such oil was known to be valuable therefor at a time when the oil could not be mined at a profit and the time when it could be so mined could not be foretold? Is it evidence of that clear and convincing character necessary to set aside a patent of the United States? We submit it is not.

It is the condition that exists at the time the patent is issued that must govern. No one can foretell what the future may bring forth. "The inquiry must be directed to the situation at that time." (*Diamond Coal Co. v. U. S.*, 233 U. S. 236) The "lands must be known at the time of their sale to be thus valuable, in order to avoid any possible conclusion against the validity of titles which may be issued for other kinds of land, in which years afterwards, rich deposits of mineral may be discovered" (*id.*). But if Mr. Veatch's theory is correct, the patent in this case should be annulled, not because the land had any value as oil land at the time the patent was issued, but because it may become valuable some time between twenty and a hundred years hence. If such a possibility should be considered, then, as was said by the Court in *U. S. v. Kostelak*, 207 Fed. 447, "Congress should legislate to that end."

The utmost that Professor Branner, the only other geological witness for the Government, could be induced to say in this connection on behalf of the Government was that if he went back to the conditions as they existed there before any wells were put down in either the Buena Vista or the Elk Hills, and he had been consulting geologist of those who anticipated putting down such wells, he would have put it to them in this way: "If you have got money to risk and you can afford to lose it, put it in there; if you cannot afford to take any risks, you had better let somebody else do it." (Tr. 1025.) \* \* \* "Perhaps I ought to say that one of the reasons for that risk lies in the fact that there is no way, short of putting a well down there, to determine the thickness of the strata that overlie the oil bearing bed." (Tr. 1025-6)

Dr. Branner also frankly admitted that it was "not possible from a surface examination such as I made of the Elk Hills to determine the depth of the oil sands", and that "the purpose of my examination was to ascertain generally whether that could be considered as *possible* oil territory, and I made no attempt to determine whether it was paying oil territory." (Tr. 1020.) Not only was he unable to determine the depth of the supposed "oil sands", but he also was unable to determine that there were any such sands in the lands in question. The most he would say is that in 1904 his opinion "would have been, owing to the formation of the

Elk Hills, that they were *suitable for the accumulation of oil*, but that would not necessarily mean that they had accumulated oil. That could be determined *only by exploration.*" (Tr. 1016.)

Neither Mr. Veatch nor Dr. Branner, the two geological experts upon whom the government relies, pretended to be able to determine either that there actually was oil beneath the lands in suit or that, if there, it could have been reached by the drill in 1904. Mr. Veatch in fact admitted (Tr. 886) that at that time the lands in suit could not have been developed at a profit on account of the depth. The only "known conditions" at that time were (a) the apparent structure of the Elk Hills so far as revealed on the surface, and (b) the existence of oil wells and seepages a number of miles away on another anticline.

But no geologist, oil man, or other person, knew in 1904, or could have known: (a) whether there were any sand beds under the Elk Hills capable of holding oil; or (b) whether there was in fact oil stored in these unknown sands; or (c) whether this unknown oil was in commercial quantity; or (d) whether these sands, if there, could be reached by the drill.

Under these conditions, it is submitted that no prudent person, contemplating the expenditure of the large sums of money necessary in an investment of this character, would regard the testimony of Mr. Veatch or of Dr. Branner as showing that the



“*known conditions were plainly such as to engender the belief that the lands contained mineral deposits of such quality and in such quantity as would render their extraction profitable and justify expenditures to that end*”.

The government also introduced the testimony of a large number of witnesses who had been upon these lands at various periods between 1899 and 1904, who also gave their opinions as to the oil character of the Elk Hills. Their testimony removed none of the uncertainties mentioned above as they could not see any farther into the ground than anyone else. The majority of them were those who had made the wildcat locations following the discovery of oil in the Kern River Field in 1899, already mentioned. Only a few of them could be called experienced oil men. None of them professed to be geological experts. None of them claimed to have sunk any wells or to have discovered any oil upon the lands. The most that any of them could say was that, in their *opinion*, the land was good oil territory, but it is apparent from reading the testimony of even the most partisan witnesses that they simply thought the prospects were good for oil. All were agreed that drilling was the only practical proof of the existence of oil. Their evidence was, of course, of no value unless it could be shown therefrom that the known conditions on the lands were plainly such as to engender the belief that they contained oil in such quantity and at such

depth as would render their extraction profitable and justify expenditures to that end. As none of these witnesses professed to be geologists, they could of course give no testimony of value as to the geological conditions of the lands. Some of these witnesses attempted to justify their theories by references to oil seepages, oil sands and asphalt or brea deposits in various places, principally along the Temblor Range. To one unfamiliar with the record, the impression might be gained from a reading of the testimony that seepages or other forms of oil indications were found at many places upon the lands in suit.

But that such is not the fact appears from the maps introduced by the Government itself, Exhibits I and O. Exhibit I was prepared by Mr. Veatch, the chief expert witness for the Government, and purports to show all of the seepages or other forms of oil indications found by Mr. Veatch or testified to by other witnesses. This map shows only two such indications anywhere near the lands in suit, one in Section 32 of Township 30-24 and the other in Section 14 of Township 30-22. These are situated on either side of the township in which the lands in suit are situated, upon or near the anticline running through these lands. A great deal of importance was sought to be attached to the fact that they are thus situated as it was claimed that they indicated that there must be a deposit of oil lying between them.

Mr. Veatch indicates another place in the southeastern part of the Elk Hills and remote from the lands in suit. He does not pretend to have seen anything there himself, but placed this "indication" on his map entirely on the faith of the testimony of the witness F. D. Lowe, who testified that he could see there what appeared to be an oil sand. (Tr. 146.) Mr. Veatch also did not himself examine the alleged oil indication in Section 14 to the west of the lands in suit except as he saw it while passing on the train. (Tr. 776-777.) One witness, Jacob Kaerth (Tr. 417) testified that there were "asphaltum reefs" all over the township in which the lands in suit lie. Mr. Veatch does not include these on his map. He says that he did not see them himself although he was on every section in the township. (Tr. 801-2) Kaerth probably had some other township in mind. At any rate he declined to point out these asphalt deposits on the ground when opportunity was offered him to do so. (Tr. 423-4, 459-461) The witness Parker Barrett testified to seepages in Section 17 of the lands in suit, but as he examined the Elk Hills prior to the time the lands in suit were surveyed, and also was considerably confused as to his directions and the distance he had traveled into the hills, it is probable that he was referring to the supposed seepage in Section 32 of the township to the east. Mr. Veatch admitted that he had not found the seepages spoken of by Barrett, but ventured the highly improbable



suggestion that they had been covered over by later work. As this "later work" had been confined to the even sections, Mr. Veatch's explanation was apparently not satisfactory even to himself, or he would have placed these "seepages" on his map.

The Government witness F. O. Martin, a mineral inspector of the General Land Office, testified that he had prepared Exhibit O in connection with J. W. Kingsbury, another mineral inspector. Martin says that he made a number of examinations of the Elk Hills between 1910 and 1912 and claimed familiarity with practically every foot of the ground in the township in which the lands in suit lie. (Tr. 346) He was therefore more familiar with the Elk Hills than was Mr. Veatch. It is significant that the Martin map (Exhibit O) shows only *one* seepage or oil indication in the entire range of the Elk Hills, that in Section 32 to the east. If there had been more there it is to be assumed that he would have shown them for he evinced a strong disposition to favor the case of the Government. He was certain that all of the seepages in the Elk Hills were indicated on his map.

Very little need be said of the alleged oil indication in Section 14 to the west of the lands in suit. The witness Martin omits it. Other witnesses testify that it consists of asphalt washed down the canyon from the McKittrick Hills to the southwest and deposited along the banks of the stream running in this canyon. The witnesses Hotchkiss and Miley

determined its real character as early as 1900. (Tr. 1745, 1789, 2090) Miley testified that its character was so evident that any competent geologist must have known at that time that it was merely "float". (Tr. 1790) J. A. Taff, a competent and experienced geologist, made a careful examination of this place and its vicinity in 1913 and found that the "brea" occurring there had not impregnated the sands but consisted of separate particles of asphaltum material, mixed with other detrital material, carried by the stream from the southwest. He agreed with the other witnesses that this was merely "float" and that it had no connection with the Elk Hills anticline. (Tr. 2765-6) No attempt was made to refute the testimony of these witnesses. We may, therefore, take it as an established fact that the supposed "seepage" west of the lands in suit does not exist and that it must have been known to any competent observer in 1904 that it did not exist. This utterly destroys any contention based upon this supposed "seepage" since such seepage did not exist.

The other condition is the supposed "seepage" or "gas blowout" in Section 32 in the township to the east. A great deal is made of this asserted indication of oil and it is very likely that misapprehension concerning its true character influenced many inexperienced locators of claims in that vicinity.

The evidence shows beyond serious question that this is not a seepage or other indication of oil or

petroleum gas. It is a purely local and surface deposit of organic or vegetable matter, somewhat resembling peat, and having no connection with anything beneath. One or two Government witnesses testified that they had tested the material at this place with chloroform and that it showed oil. Although the chloroform test is the recognized method of determining whether oil exists or has existed, its use requires an amount of skill not possessed by the ordinary man. Even the expert witness for the Government, Mr. Veatch, admitted that he had tested this material with chloroform without finding an indication of oil, but he sought to explain his failure by saying that the oil, which had been there, had probably been burnt out on account of the escaping gas having caught fire. (Tr. 712-3)

F. M. Anderson, an expert geologist, tested this material with chloroform and in other ways, together with Dr. Stark, chemist for the Standard Oil Company, and found no evidence of oil or bituminous matter. He unhesitatingly pronounced this place merely a surface deposit of organic material and said that it had no connection with the occurrence of petroleum anywhere. Mr. W. H. Ochsner, another of the geologists who examined this place, said that he saw it in 1909 and concluded then that it was nothing more than a deposit of plant remains laid down during brackish water conditions in recent geological times. Its character was so evident



that he did not think it necessary to test it with chloroform. (Tr. 2215-16)

The most thorough test of this deposit was made by J. A. Taff. In order to ascertain the extent and character of this material, he had excavations made passing entirely through the deposit. In fact, he ran a cut through the principal occurrence of this deposit revealing clays beneath and showing that the alleged oil material had no connection with anything below by means of any crevice or break in the underlying formations. In this way he obtained an entire cross-section of the deposit and conclusively demonstrated that it was purely a surface deposit. A short distance below the surface of this material he found places where the organic matter impregnating the sands had collected in lumps. This material, he said, would "ball up" in the hand. (Tr. 2760-62) This is the same thing that the witness Silas Drouillard observed in 1874 and again in 1899 (Tr. 121-2) and conclusively shows that there had been no change in this deposit due to burning.

Mr. Taff also testified to testing a number of samples by means of chloroform. He also dried them and found they burned like an ordinary piece of peat. (Tr. 2761-2) He summed up his conclusions by saying that this is not an oil seepage or petroleum gas "blowout" and has no significance at all in determining the character of the lands in the Elk Hills. (Tr. 2762)

In this instance also, the Government made no attempt to contradict this testimony. In fact, the evidence that this is not a seepage or in any way an oil indication is so conclusive that it would have been idle to have attempted to show the contrary. We are, therefore, able to say that there was not a single surface indication of oil at any point in the Elk Hills. With these alleged "seepages" gone, the sole remaining conditions upon which the possibility of oil being in the Elk Hills could have been predicated by anyone in 1904 are the wells and seepages many miles away along the Temblor Range, which, according to Mr. Veatch's hypothesis, would indicate the presence of oil in the Elk Hills themselves, and the structure of the hills themselves and their position. Granting, however, that the wells and seepages along the Temblor Range and the structure and position of the Elk Hills themselves indicate the possibility, or even the probability, of oil, and granting also that the seepages which we have just been discussing were in existence as claimed, the most that such things could show from even the Government's point of view would be the existence of oil in the Elk Hills. There is no pretense that such conditions would show the amount of such oil or the depth at which it was located or whether its exploitation was practicable. This condition is, as we have already pointed out, as important as the existence of oil itself. The burden of showing not only that the oil existed in substantial quantities

in the Elk Hills, but that it also existed at such a depth as that it could be exploited at a profit, rested upon the Government. If there was no available way of determining the depth at which the oil was located so that at least some reasonable conclusion might be reached in regard thereto, that fact alone should be sufficient to demonstrate that the Government's case must fail when measured by the asserted rule laid down in the *Diamond Coal Company* case. It may be justifiable to take away a citizen's property upon a geological deduction when the conditions which support such theory are plainly known. Here, however, one of the conditions essential to the correctness of the Government's theory in this case is not known. It is not only not known, but there is not the slightest evidence to support even a speculation as to what the facts are with reference to such condition. To take away a citizen's property upon such condition of affairs would not be due process of law. It would be simply an act of confiscation, such as despots may exercise, but which can find no justification under our form of government.

The defendants might therefore be well justified in submitting this case upon the testimony introduced by the Government itself. For if our views are correct, such evidence falls far short of measuring up to the requirements of the rule announced in the *Diamond Coal Company* case; and it will not be disputed that, unless the evidence does bring this



case within that rule, judgment should go for the defendants.

We shall, however, go further and endeavor to show that the evidence is not only insufficient to sustain the Government's contentions, but that it affirmatively establishes the falsity of the Government's contentions.

#### IV.

**The lands in suit were not only not known to be valuable for oil at the time patent issued, but all the known conditions then existing clearly indicated that they possessed no value as oil lands.**

The foregoing statement and discussion has been to little purpose unless we can now fairly visualize the situation in the Elk Hills as it existed on December 12th, 1904, the date on which patent was issued.

The Elk Hills, as already stated, are a range of hills about seventeen miles long and about six miles wide. Upon the day on which patent was issued, there was not only not a single oil well or derrick upon any part of this land, but there was not a single seepage or other surface indication of oil. No mining work of any kind was going on. (Tr. 1971) The section corners were covered with location notices but they all dated back to 1900, 1901 and 1902. (Tr. 1971) They had, as we have seen, all been abandoned. There were no oil operations or oil indications upon adjoining territory to the north,

east or southeast of the Elk Hills that would indicate that the Elk Hills contained oil, and it is not pretended that there were. Adjoining the Elk Hills on the south and west were the Buena Vista Hills. Even the Buena Vista Hills did not at this time contain any oil wells or indications of oil. (Tr. 1991) The general opinion at that time was that "it was not looked on as good judgment to go out toward the Buena Vista Hills for oil." (Tr. 1724.) Prior to 1905 the general opinion of oil men was that oil was confined to a narrow line along the eastern slopes of the Temblor Range. (Tr. 1796, 1826, 1887, 1932, 1974, 2007, 2060, 2077) The Buena Vista Hills are between the Temblor Range and the Elk Hills. The oil field maps published annually by Barlow & Hill, and which were carefully prepared and used generally by oil men, show that prior to January 1, 1905, the oil development was along the northeast side of the Temblor Range and varied in width from two to three miles out to the foothills of the range. "At that time it did not get away from the foothills any distance to speak of." (Tr. 2007) The McKittrick, Midway and Sunset oil fields, as now developed, lie along the base of the Temblor Range from four to fifteen miles to the west, south and southeast of the lands now in suit. (*id*) The first discovery of oil in the Buena Vista Hills was not made until February 2, 1910. (Tr. 1994) As was said by Professor Branner, one of the geological experts for the government in this

case, in a report made by him to a firm of Los Angeles attorneys, dated October 18, 1910, concerning the oil possibilities of the Buena Vista Hills:

“If oil had not been found, however, in the region south and west of the Buena Vista Hills a geologist would have been very bold indeed who would have ventured to predict the existence of petroleum in the Buena Vista Hills themselves.” (Tr. 1992)

There were, therefore, not only no indications of oil upon the lands in the Elk Hills themselves, but there were no indications of oil upon any of the lands surrounding the Elk Hills. In fact, there was no development at that time at all along the main range opposite the Elk Hills in 1904 (Exhibits H-a, H-b and H-c, Tr. 111-12) The nearest wells were on the McKittrick anticline, which is really opposite the northern extension of the Elk Hills. These were four miles from the nearest lands in the Elk Hills. (Exhibits H-a, H-b and H-c, Tr. 111-12) The evidence is undisputed that for years oil operators confined their operations along the base of the Temblor Range.

The Barlow & Hill map, already referred to (Tr. 109-112, 2000) and the maps of the California State Mining Bureau for December, 1903 (Exhibit 13, Tr. 2157) demonstrate this conclusively. The most trustworthy indication of the place where practical oil men, or even speculators, think oil is to be found



is where they drill their wells. If the lands in suit had been known to contain oil, or had even been seriously considered to be probable or even possible oil lands as early as 1904, it is very strange that not a well was started in that vicinity until six years later. The excuses offered that the price of oil was low and that the lands were withdrawn are not convincing. Development work went on elsewhere in that region and resulted in an opening up of extensive areas in the Midway Flat for instance. The withdrawal order extended to lands in the Midway field and elsewhere where location and development continued right along. But it only suspended the land from *agricultural* entry. It did not prevent mineral entries (See letter from Assistant Commissioner of General Land Office to Register and Receiver, Visalia, February 11, 1904, Tr. 1555). See also *Olive Land & Development Co. v. Olmstead*, 103 Fed. 568.

In reply to the attempts of the Government to show that the Elk Hills were generally considered to be oil lands by oil men prior to the date of the patent now in suit, the defendants put in the testimony of twenty-five men, all of whom had been engaged in the oil business in that vicinity in one form and another prior to and at the date of the patent. Most of these men were then active operators engaged in prospecting for or actually producing oil in the McKittrick or Midway districts. They were in a position enabling them to keep in close touch

with the comment going on in these districts concerning the places where oil might be found. Some of them were at that time actively engaged in looking for promising oil land either for themselves or for their employers and, in doing so, had occasion to review the possibilities of that entire region. If the Elk Hills were at that time *known* to be oil lands, these men would inevitably have learned of the fact. If there had even been a common impression that these hills were possible or "prospective" oil lands, they would also have known it. Most of the twenty-five witnesses referred to had occasion to go into the Elk Hills between the years 1900 and 1905, either to examine them for oil possibilities, or for other reasons. Many of them had seen and examined the alleged seepage in Section 32 of Township 30-24. With possibly two exceptions, they were men whose interests at the time they testified were entirely independent of those of any of the defendants.

It is not possible to discuss their testimony in detail within the space at our disposal, nor is it necessary to do so. Their names and references to the record where their testimony may be found are inserted in the margin.\* With unanimity that

\*NOTE:—(1) E. J. Miley, operator at McKittrick since 1900 (Tr. p. 1715-16); (2) David Kinsey, driller and superintendent on "West Side" since 1896 (Tr. p. 1796-7); (3) H. C. Goodyear, at McKittrick from 1902 to 1905 doing general work around oil wells (Tr. p. 1818); (4) W. H. Cooley, operator and superintendent in McKittrick and Elk Hills in 1903 (Tr. p. 1810); (5) S. J. Dunlop, operator in Midway since 1899 (Tr. p. 1820-1); (6) Fred H. Hall, interested in development of oil in Midway since 1901 and familiar with Elk Hills then and during recent development (Tr. p. 1824, 1826); (7) H. W. Thomas, operator of extensive properties on "West Side", in oil business since 1900 (Tr. p. 1829-30); (8)

can come only from the clear fact of what they say, they testified that during all the years between the beginning of the oil industry in that region and the date of the patent in question, and even for several years later, it was the common belief among oil men in that region that the oil lay in a narrow zone along the eastern flank of the Temblor Range and that the Elk Hills were not even considered to be within the range of *possible* production. They even failed to recognize the possibilities of the present Midway field at that time, although a few of

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R. K. Howk, dealer in oil well machinery, operator of wells at McKittrick from 1901 to 1904 and engaged in examining prospective oil lands for other people at that time (Tr. p. 1842-44); (9) B. M. Howe, manager of oil companies, in oil business since 1898, drilling in Midway and examining surrounding country for locations in 1901 (Tr. p. 1887); (10) J. J. McClimans, operator in oil business since 1884 in Pennsylvania, and since 1900 in California, operating at McKittrick 1900-4 (Tr. p. 1932); (11) H. H. McClintock, superintendent of oil properties, superintendent pipe lines for Standard Oil Co. in McKittrick and Midway fields 1904-10 (Tr. p. 1974); (12) M. H. Whittier, operator of extensive oil properties in California and Indian Territory, twenty-three years' active experience, began operating oil wells at McKittrick in 1899 and in close touch with conditions there since (Tr. p. 1984-5); (13) C. A. Allison, sold oil well supplies in "West Side" 1900-3 (Tr. p. 1999-2000); (14) C. A. Barlow, oil operator in Midway since 1901, collected data for Barlow & Hill's maps from 1901 on concerning oil development in "West Side" fields (Tr. p. 2007); (15) Chas. T. Burks, oil operator in Midway since 1900 (Tr. p. 2060); (16) L. E. Doan, operated oil properties in Kern River, Coalinga and "West Side" fields since 1900 (Tr. p. 2071); (17) L. B. McMurtry, oil operator in Midway and elsewhere since 1900 (Tr. p. 2077); (18) E. W. Kay, oil operator in Midway since 1900 (Tr. p. 2085); (19) Fred Kimble, in oil business since 1900, at McKittrick and vicinity looking for oil lands in 1903 or 1904 (Tr. p. 2117-8); (20) John P. Kerr, fifteen years in oil business, engaged in looking for prospective oil land for large company in "West Side" fields from 1901 on, examined Elk Hills in 1902 (Tr. p. 2125); (21) R. E. Graham, oil operator in Midway since 1901 (Tr. p. 2132-3); (22) Samuel Shannon, oil operator, began oil business at Coalinga in 1898, went to "West Side" fields in 1904 (Tr. p. 2140-1); (23) U. S. Waugh, in oil business since 1898 (Tr. p. 2146-7); (24) C. A. Hively, field superintendent Kern Trading & Oil Co., in oil business since 1900, at McKittrick 1900-5 (Tr. p. 2161); (25) D. S. Ewing, attorney, interested in oil business in "West Side" fields since 1901 (Tr. p. 2250).



them said it was "suspected" that oil might be found there.

It was not until what was known as the "Honolulu well" was sunk in the Buena Vista Hills, in February 1910, that any importance was attached to the Elk Hills as oil lands. Then, and then for the first time only, did any drilling begin in the Elk Hills. (Tr. 1994, 2050-1) This was more than five years after patent was issued to the railroad company.

## V.

**The agents of the railroad company did not know, or even believe, that the lands in suit were valuable for oil in 1904.**

It follows, from all that has been said in regard to the location and character of the lands in suit and the impossibility of anyone knowing or even thinking with reason that they contained deposits of oil in 1904, that the agents of the railroad company must have been in the same state of mind as everyone else. There is no suggestion in the testimony that they possessed powers of divination denied to oil men in general. They could not see into the ground any farther than anyone else. There is no evidence that any agent of the railroad company made secret explorations or sunk hidden wells in the Elk Hills. They knew, and could know, only what was open to the knowledge of others.

It cannot be seriously contended that any agent of the railroad company *knew* in 1904 that there was oil in the Elk Hills in such quantity and position as to warrant the reasonable hope of its extraction at a profit. The most that is really claimed is that agents of the company believed that there *might* be oil in these hills and therefore *believed* that the lands in suit had a speculative value for oil. Mr. Veatch called this speculative value a "prospective" value. What we call it is not as important as what it is. It is a misuse of words to say that these lands at that time had any sort of a value *for oil*. They had no known value for oil as no one could know that there was a barrel of oil in these hills in advance of drilling. They may have been thought by some to have had a value *for speculating* on the chance that there might be oil in them or that some purchaser could be induced to think there was. The sort of value Mr. Veatch relies on might exist (and frequently has) as to lands absolutely barren of oil.

C. W. Eberlein, the land agent of the railroad company, who made the non-mineral affidavit to the railroad company's selection list, knew nothing about the lands himself. He had never seen the lands. He had but recently taken charge of the land department of the company. "I would not have known about them if I had been told. It must be remembered that I was as green about the land affairs of the Southern Pacific, almost, as it was

possible to be." (Tr. 1292) He found that a large amount of base lands, under the company's land grant had been lost, and he at once instructed his assistants to prepare a list and to make indemnity selections. (Tr. 1087) It was his plan to select promptly and to save everything possible to the company. (Tr. 1157) He says that the company had theretofore understood that indemnity lands had belonged to it even before selection, but a ruling to the contrary had been made shortly before this time and he thought there was danger of losing more in the future. This "was one of the first things I paid attention to." (Tr. 1155-6)

Some stress has been laid upon the fact that Mr. Eberlein did not at that time direct a special examination of these lands. In truth, he had no reason to do so. They were far removed from producing oil territory and Mr. Eberlein had good reason to believe that his assistant, Mr. Stone, knew all about them. Stone himself testified that he was acquainted with the lands in Township 30-23 from having been frequently in that country for two years preceding the selection. (Tr. 1029)

Mr. Eberlein says: "That list of lands was made by my order on the representation to me that it was non-mineral by my assistant, who was fully informed." (Tr. 1114) "He was thoroughly familiar with the lands, so he told me." (Tr. 1088) On being asked whether he had sent anyone to make an examination of these lands he replied: "I didn't



consider it necessary. Stone was familiar with the land—claimed to be.” (Tr. 1137)

That the general situation in 1903 required prompt action to prevent the loss of indemnity lands, wherever situated and whatever their character, is shown by the advice of Mr. D. A. Chambers, who was the Washington attorney for the railroad company at that time. In reply, apparently to a communication from Mr. Eberlein as to the effect of the general withdrawal order upon the contemplated selection, Mr. Chambers wired: “I think you should immediately select lands in Township thirty south range twenty-three east and if local officer refuses list appeal to commissioner. This ought to be protection against adverse claimants filing or alleging settlement later than our selection. Right of railroad company to indemnity lands is determined by their status at date of selection.” (Tr. 1479)

The “adverse claimants” whom Mr. Eberlein and Mr. Chambers had in mind, could not have been mineral claimants, as the filing of a selection list could not affect the right of a mineral locator to file upon the ground at any time prior to actual patent. It is therefore apparent that the haste in making the selection of the lands in suit was not due to any fear of mining locations but was thought necessary in order to prevent possible agricultural settlement on these lands.

As soon as possible after the receipt of this telegram, the application for patent to these lands (Selection List 89) was filed with the local land office at Visalia. This was on November 14, 1903. (Tr. 3815)

This selection was promptly rejected by the local land officers because of the general withdrawal order of February 28, 1900. We can best express the situation, as Mr. Eberlein understood it, by his own words. "It was a blanket withdrawal," he says, "of everything because—I didn't understand it was because of any discovered mineral, but because of the mineral excitement probably, in the neighborhood in there somewhere in that part of the country. \* \* \* \* \* I talked with Mr. Stone; I don't know whether anybody else; and from my talk with Mr. Stone and the extent of that withdrawal, the impression on my mind was that it was just one of those things, a sort of drag-net affair and that there might or might not be mineral in any of that territory. There had been none found, so far as I know. \* \* \* \* \* It was one of those hastily done things that didn't mean that the land was mineral." (Tr. 1160)

The rejection of this list, therefore, was not an indication to Mr. Eberlein that the lands were mineral. "Why, it came back to the office," he says, "and my impression being that it was probably something that required only action by the government to release, or release in part, I made application to

the Secretary of the Interior, through our representative in Washington, to have a representative of the Department make an examination of these lands covered by our list." (Tr. 1161)

We are already familiar with the action taken by the government in sending a special agent, E. C. Ryan, to examine these lands. In speaking of Ryan Mr. Eberlein said: "I never saw him, never had any communication with him; but he was sent into the field and did make an examination and reported.

\* \* \* \* The impression conveyed to me was, and I found the fact to be, that the suspension order was revoked, at least as to these lands of ours, and we made the selection and the selection list was approved." (Tr. 1161-2) He further testified that the action of this inspector was in no way influenced or controlled by him or by any one else connected with the railroad company, to his knowledge." (Tr. 1162)

The examination and report of Ryan had an important influence in confirming in Mr. Eberlein's mind what Stone had already told him about these lands. "I also had," he says, "the direct backing of the government in making that non-mineral affidavit." (Tr. 1114, 1163)

It should be borne in mind that Mr. Eberlein, when he selected these lands, understood that there was a deficiency in the land grant of the company and that there were not sufficient lands to supply the deficiency in the primary limits. (Tr. 1154)



So it was not so much a question as to the value of these lands for agriculture or grazing as it was whether the company would receive *any indemnity* for its losses within the granted limits. The company had to take these lands or none at all. The government gave its land grant to aid the railroad in its construction through an arid region. That the land it was thus forced to take had but little value was the company's misfortune. It was not its fault.

The practical oil men and geologists in the employ of the Southern Pacific Company during the year in which these lands were selected were J. B. Treadwell, Josiah Owen, E. T. Dumble and F. M. Anderson. All of them testified, except Josiah Owen who was dead.

J. B. Treadwell was in charge of the development of oil for the Southern Pacific Company until the spring of 1903 when he was succeeded by E. T. Dumble, who was then and has since been the consulting geologist of the Southern Pacific Company but has not been connected with the Southern Pacific Railroad Company. (Tr. 424, 2907)

One of Mr. Treadwell's duties was to advise the land department of land belonging to the company that either was oil land, or might possibly be oil land, in order to prevent its sale as agricultural land, but he did not consider that the Elk Hills had any value as oil land. (Tr. 436) It was not

considered promising oil territory at that time. (Tr. 437)

As Mr. Dumble's other duties required that he spend a great deal of his time in Texas and elsewhere, he appointed Josiah Owen as his assistant to take immediate charge of oil operations in the California fields where the company was then producing oil. (Tr. 2907)

Owen was dead when the case was tried, but Dumble testified that he (Dumble) "was never in the Elk Hills, or on the lands in 30-23, that is in controversy in this suit; up to the time that the patents were issued there had never been a report made to me either by Mr. Treadwell, Mr. Owen or Mr. Anderson." He adds:

"I have absolutely no recollection of ever having spoken to anyone or written anyone whatever regarding the oil possibilities of this land prior to the issuance of these patents; nor is there in my files, so far as the exhaustive search will disclose, a single scrap of evidence in regard to it." (Tr. 2971)

Mr. F. M. Anderson, a geologist, testified that he met Mr. Owen for the first time at McKittrick in March, 1903 (Tr. 2381) and that he visited the Temblor Range with Mr. Owen (Tr. 2381); that as they came across the valley from Bakersfield to McKittrick he saw the hills now known as the Elk Hills. Mr. Owen told him he had been there about a month and had visited about all parts of the

valley contiguous to McKittrick. Mr. Anderson then asked him if he had been in those hills (meaning the Elk Hills) and he said he had. Upon being asked what he saw, Mr. Owen described the geological conditions. "I asked him if it looked anything like oil land over there and he said he hadn't seen anything that looked like oil; that he didn't think it was an oil district or that it was oil land. \* \* \* \* I remarked to Mr. Owen that I thought the hills were a long ways out from the foothills of the Temblor Range where the oil was likely to be. He said yes, it appeared that way to him." (Tr. 2382-3) On another trip by Owen and Anderson two days later into the Midway field, the Elk Hills were again discussed, among other things, and "our conclusion was that these hills laid too far away from what he had seen as representing the outcrop of the oil sands—too far away to ever be valuable oil territory." (Tr. 2388)

It is also in evidence that Mr. Owen stated to the geologist W. H. Ochsner in August, 1907 that he thought the Elk Hills would not be productive territory; that he thought the hills were too far out to fill. (Tr. 2172)

C. A. Hively also testified that some time in the Fall of 1904 or 1905, he was not sure which, Mr. Owen "came into the office one evening, after he had been out a couple or three days, very tired and said that he was all worn out from horseback riding and that he had been over every foot—or some



expression of that kind—of what is known as the Elk Hills territory trying to discover some indication of oil. He told me he was unable to discover any indications which led him to believe that there was any oil in the Elk Hills field.” (Tr. 2161)

S. P. Wible, a witness for the government, also testified that in 1903 or 4 he went through the Elk Hills with Mr. Owen and that he “discussed with Mr. Owen the geological conditions and oil possibilities of lands in the vicinity of McKittrick.

\* \* \* \* He told me that he believed the oil measures lay under the Buena Vista Hills and that he thought they lay very deep under the Elk Hills.”

(Tr. 320) “\* \* \* \* \* Mr. Owen said he believed the Elk Hills might contain oil. He said the oil measures lay under them and he thought they were probably so deep they couldn’t be reached and made to pay. I had some conversation with him with reference to some land in Township 30 South, Range 23 East, in which he told me that oil could be reached at three thousand feet or over and we didn’t drill because we didn’t figure that it would pay to drill for it. At that time there were no such wells drilled in the country to that depth. (Tr. 328)

Charles F. Haberkern, also a government witness, testified that he knew Mr. Owen intimately and had been in the Elk Hills with him, the first time in August or September, 1904, when they went all over the Elk Hills from one end to the other.

Mr. Owen "told me the land is very valuable for fullers earth and gypsum but he thought there was oil there but that it was very deep and wouldn't pay to go after it." (Tr. 350)

W. H. McKittrick, also a witness for the government, testified that Mr. Owen told him in 1907 that he had been quietly making examinations of the Elk Hills for several years and that he had located large deposits of fullers earth there. "He said," added the witness, "there was a possibility of oil there but oil could not be found under thirty-four hundred feet. Of course, at that time no one thought of going thirty-four hundred feet for oil. I didn't know of anybody else thinking about it." (Tr. 528)

It is very apparent from what several of these witnesses have said that Mr. Owen was thoroughly convinced, as time went on, that there were valuable deposits of fullers earth in some parts of the Elk Hills. It is not testified by anyone that any of these deposits are in the lands in suit. In fact, it is the present contention of the government that there is no fullers earth in the Elk Hills. (Tr. 683) It is, however, equally evident that Mr. Owen did not attach any importance to the Elk Hills as oil lands. The most he ever seems to have thought was that there was a "possibility" of oil being there. But in every instance he qualified this by the further caution that if it was there it would be deep, too deep for profit.

Mr. Dumble testified also that he did not know that application had been made for patent to the lands in suit by Mr. Eberlein; that he did not have any conversation with Mr. Eberlein, Mr. Stone, or anyone connected with the land department of the company concerning the selection and listing of these lands; that no one in his office and under his direction made any such suggestion to Mr. Eberlein or Mr. Stone to his knowledge; that he did not give any such directions to anyone and had no communication with Mr. Kruttschnitt or other officials of the Southern Pacific Company, the Southern Pacific Railroad Company, Kern Trading & Oil Company or the Associated Oil Company, by letter or otherwise, with reference to selecting lands in the Elk Hills; that these lands were not applied for by Mr. Eberlein as the result of any recommendation or suggestion made by him to anyone; that the lands in this township had never entered into his mind as oil land at all. The conditions around McKittrick all seemed to him to preclude the possibility of oil occurring that far away from the outcrop. (Tr. 2927-8)

Mr. Anderson, as we have already seen, did not believe these lands were of any value as oil lands. No useful purpose would be served in repeating or commenting upon his testimony again.

If the testimony of these witnesses is to be believed, and there is no evidence to the contrary, it should be conclusive upon the question as to



their knowledge, or even belief, as to the oil character of the lands in suit at the time patent was issued. That they could not have known that there was oil in the Elk Hills in such quantity and position as to warrant the reasonable hope of its extraction at a profit is self-evident; that they did not believe that there was any such oil is not only apparent from their own testimony but is corroborated by the admitted facts and the testimony introduced by the government itself. For the government's own geological witnesses, it will be remembered, declined to even express the belief that any oil could have been found in the Elk Hills in 1904, or at any other definite period, at such a depth as would have permitted its extraction even at a loss.

## VI.

The lands in suit have not yet been proven to contain valuable deposits of oil or other minerals. The uncontradicted evidence shows that no attempt was made to develop the Elk Hills as oil lands until subsequent to February 2, 1910, more than five years after patent issued to the company. Subsequent to this date thirty-six wells were drilled within the limits of the Elk Hills varying from a few hundred feet to nearly five thousand feet in depth. Only three of these wells resulted in the discovery of as much as a gallon of oil and these three wells were closed down because they were not profitable wells.

Under the rule laid down in the case of *Diamond Coal Co. v. United States*, 233 U. S. 236, the inquiry concerning the mineral character of the land now sued for must be directed to the time when the patent was issued. If it was not known to be mineral then and under the conditions then existing, no subsequent discoveries or improvement in drilling methods can be considered as a basis of recovery.

The issue here is as to whether or not these lands were known to contain valuable deposits of oil at the date of the patent, and it must follow that if all exploration to date has failed to establish the mineral character of the land, it is immaterial what any one may have supposed or believed as to the existence of mineral before the patent was issued.

Evidence that no such deposits were then discovered and that none have been discovered since, is therefore material to establish the fact that these lands were not mineral lands at the date of the patent. As already said, the existence of mineral, in this case oil, in these lands at the date of the patent must be demonstrated as a fact and not merely as a belief.

It is our contention that these lands were not only not *known* to be mineral lands at the date of the patent, but that they could not have been so known for the very good reason that subsequent work on adjoining lands interspersed with the sections in suit has pretty thoroughly demonstrated that these lands are not mineral at all. If they do not contain deposits of oil, which would have been valuable under conditions existing in 1904, the government has not been defrauded in any view we may take of the evidence.

It is not necessary to discuss the details of the voluminous testimony concerning the wells which have been recently drilled in the Elk Hills. There are certain facts standing out in this testimony so prominently that we may safely rely on them without concerning ourselves with the many suggestions and insinuations of bad faith and concealment which counsel for the government have indulged in with regard to some of these wells.

We have seen that in the early years oil operators and prospectors confined themselves to a narrow and



broken line of development along the base of the Temblor Range. As time went on they gradually "felt their way out" farther and farther in the Midway into ground not thought at first to contain oil. This discovery of new territory stimulated interest in other places and soon locations were being made in the Buena Vista Hills and even some as far out as the Elk Hills. In 1909 actual drilling commenced in the Buena Vista Hills in Section 10 of Township 32-24. This well encountered considerable gas which further stimulated interest in outlying districts, particularly as land close at hand had all been located somewhat earlier.

This well in the Buena Vista Hills, which is frequently referred to in the testimony as the "Honolulu" well, came in as a "gusher" on February 2, 1910. (Tr. 1994) John A. Pollard, the man who "brought in" this well, says that the morning after the oil was struck, he observed with his field glasses great activity in the valley to the north where he could see numerous teams hurrying into the Elk Hills with materials for building camps and drilling wells. This extended, he said, almost across the south portion of the hills. (Tr. 1994) During this excitement all sorts of people went into the Elk Hills in the mad rush to get some of the remaining open land or to lease or purchase existing claims. Even practical oil men and companies caught the fever and rushed in with the rest, since the discovery of oil in the Buena Vista Hills had upset their prior

notions. B. T. Dyer, who at the time he testified was field manager for the General Petroleum Company, in speaking of this excitement said: "Everybody was going in. We followed along like a lot of sheep." (Tr. 2051) The Associated Oil Company and a number of other large companies went in with this same rush. (Tr. 1888, 1804, 2134)

The evidence of expenditures, for drilling in the Elk Hills following this rush, shows that the companies and individuals who went in there at that time spent \$1,846,613. This by no means represents the entire cost of this development as in some cases it was not possible to ascertain what was spent. It is quite probable that the total exceeds two million dollars. *Exhibit 16 shows that there were thirty-six wells drilled within the limits of the Elk Hills varying from a few hundred feet to nearly five thousand feet in depth. Only three of these wells resulted in the discovery of as much as a gallon of oil. These three will be spoken of later. Today these hills are abandoned by those who spent this money so lavishly in the effort to prove the existence of oil. One witness testified that he had ridden from one end of the hills to the other in December, 1912, without meeting a soul. (Tr. 2134) Another said that in November of the same year all the properties were idle and in some places the derricks had been torn down and hauled away. (Tr. 2259) The witness R. K. Howk testified that he had bought some abandoned rigs in these hills and was negotiating for*

the purchase of others. (Tr. 1845) This suit was started during the height of the excitement when drilling was active in these hills. Before the completion of the testimony this drilling had ceased and the hills had returned to the same quiet that had prevailed before, with here and there a watchman to protect machinery not yet removed. This suit, like the drilling of these many unsuccessful wells, was the product of the sudden excitement of the time, and, again like the wells, must fail because the oil is not there in commercial quantity.

On the western side of the township, in which the lands in suit are situated, the Scottish Oil Field Company drilled a well 4005 feet deep in Section 20, got nothing and abandoned the well and the section. (Tr. 2041-2) The Redlands Oil Company, of which the government geologist Ralph Arnold was a director, drilled a well 2850 feet deep on Section 30 of the same township, got what they thought was a "color of oil," thoroughly tested the well and abandoned the ground. (Tr. 1954-5) The Midway Pacific Company drilled a well on Section 32 of the same township to a depth of 2425 feet, got nothing and abandoned the property. (Tr. 1954) The Hillcrest Oil Company drilled a well on Section 28 of the same township to a depth of 1670 feet, found some gas but no oil and quit work there in April, 1911. (Tr. 1953)

The witness John Lang, who had charge of the drilling of the Hillcrest well and advised in the



drilling of the others mentioned, testified in December, 1912, that he thought the *eastern* part of this township was "possible" oil territory but said that he did not think the territory where the Scottish well was situated was oil territory. As to some of the other wells on the western side of the township, he said that he thought "they would have a chance" to get oil if they went deeper. (Tr. 1963, 8, 9) This is the most favorable statement concerning the western half of this township any witness made since the wells have been drilled there, but it falls very far short of proving the oil value of that portion of the township. It is hardly the "clear and convincing" evidence demanded by the law.

Coming to the eastern side of the township, we find that all of the wells drilled there were put down by the Associated Oil Company, of which the Southern Pacific Company owns a majority of the stock. This company drilled three wells on Section 22, 1185, 1480 and 2980 feet deep respectively. None of these found oil, although they were all "favorably located" near the crest of the Elk Hills anticline. (See Exhibit O.)

The Associated Oil Company also drilled four wells on Section 24 of this township, 95, 1187, 1291 and 3887 feet deep respectively, the latter of which found oil in considerable but not commercial quantity, considering the depth and small production. It also drilled four wells on Section 26 of the same township. Three of these were shallow. The fourth



was 4030 feet deep and also found oil, which did not prove to be commercial in quantity. The same thing was true of a well drilled by the same company in Section 30 of Township 30-24 to the east, which was drilled to a depth of 3838 feet.

These three deep wells of the Associated Oil Company are the ones which counsel for the government has described as "gushers" coming in with an "enormous" production. They are the only wells in the entire Elk Hills district which have produced as much as a gallon of oil. All the others lying to the east and south as shown on Exhibit 16 proved to be failures and have been abandoned. The case of the government, so far as it attempts to show that there is really oil in the Elk Hills in commercial quantities, must therefore rest entirely on these three wells of the Associated Oil Company. In short, the defendants have themselves furnished the only evidence that there is a drop of oil in the Elk Hills and have furnished this evidence since this suit was started.

At every turn it was suggested by the government that the Associated Oil Company has endeavored to conceal the true condition of these wells in order to make it appear that they are not successful. This accusation is a virtual admission that their showing has not been successful or encouraging. We fail to understand by what process of reasoning the officials of the Associated Oil Company, after having spent more than half a million dollars in trying to

demonstrate that these were oil lands, would conclude to attempt to conceal their production and even to destroy the wells, as counsel has claimed. If the interest of the Southern Pacific Company, as dominant owner of the stock of the Associated Oil Company, ever required that the existence of oil in the Elk Hills be concealed because of this suit, the time to act would have been when the suit was started, which was long before either of these wells struck oil. It would have been easy then to have found a plausible excuse to cease drilling and thus deprive the government of its only evidence that there was a drop of oil in these hills and, at the same time, save the major portion of this half million dollars.

Not only did the Associated Oil Company continue its own wells, but it encouraged the Scottish Company to drill deeper in Section 20 to the west at a time when it had determined to cease drilling. (Tr. 2043, 6, 7) It is obvious that the Associated Oil Company, having gone into the Elk Hills along with all the others during the general excitement, endeavored in good faith to demonstrate whether there was oil there in paying quantities or not. In the natural course of things the field officers in charge of production must have suggested and encouraged the first venture into these hills. After they had gone in it would be their tendency to endeavor to justify themselves to their superiors. And it is significant that this company persisted in its

efforts to demonstrate that there was oil in the Elk Hills long after the other adventurers had become disgusted and abandoned the field.

The fact that the Associated Oil Company kept on as it did in the effort to prove that there was oil in these hills seems to be incomprehensible to the counsel for the government in this case. The simple and obvious explanation that this company kept on because it had put a large amount of money into those hills and wanted to find enough oil to recoup itself, is not consistent with the atmosphere of suspicion and distrust with which the government has attempted to surround this case. Nor does it occur to them as possible that the officers and counsel of the railroad company never thought it necessary to call a halt upon the proceedings of this subsidiary company. The railroad company has had nothing to conceal, and being confident that there has been no fraud at any stage of the proceedings involved in this suit, it has had no reason or wish to force the Associated Oil Company to abandon its prospecting in the Elk Hills or to conceal or misrepresent the production of its wells.

Counsel for the government have attempted to explain away the statement just made by charging that it was the purpose of those in charge of the affairs of both the railroad company and the Associated Oil Company to fraudulently retain the odd sections in Township 30-23 for the railroad company as agricultural lands, and to get mineral



patents to portions of some of the even sections for the Associated Oil Company as oil lands.

Among all the insinuations and innuendoes of the government attorneys, it is not stated or claimed that the men in control of the railroad were fools, and yet if the theory of the government attorneys is correct that the railroad men knew the land was valuable for oil, the last thing they would do would be to do that which it is claimed they did. The railroad company already has a patent to the ten sections of land in suit, which, according to the assumption of the government, are valuable oil lands worth at least fifteen million dollars. The railroad company owns but fifty-one per cent. of the stock of the Associated Oil Company. It is not conceivable that those in charge of the railroad company would deliberately imperil its patent to the *ten* sections on the chance of obtaining a mineral patent for its subsidiary for a *part of two* sections, in which the railroad would have but a fifty-one per cent. interest if the patent were obtained. Intelligent men do not do business that way. The very fact that the Associated Oil Company did go ahead with its wells and was permitted to make the only discoveries of oil that have ever taken place in the Elk Hills, and that this was all done *after* the government had started this suit, is convincing proof that the charge of fraud in this case is without foundation.

The attitude of the government in connection with these wells of the Associated Oil Company has been most peculiar. Instead of endeavoring to show the true history of these wells by calling for the records concerning them or offering the testimony of someone who was familiar with their operation, only the evidence of one man, who had been present during a few days when one of the wells had a heavy production, was offered during the case in chief. (Tr. 409-16) This witness testified that the well on Section 30 had flowed for three days at the rate of 406 barrels a day. He left the well then and was not able to state whether this flow continued or whether the well was simply "blowing its head off" as frequently occurs when a well is first tested out. The truth of the matter, as appears from the daily reports of this well later put in evidence, is that the production of this well rapidly fell off until it would not pay to pump it. Yet this well has been constantly referred to in argument as a "406 barrel well."

On the other hand, the defendants put in evidence in this case the full official records of each of these wells showing day by day what was done with them in the effort to make them producers. The witness W. E. White, chief clerk to the Field Manager of the Associated Oil Company, in whose custody are kept the daily and other drilling and operating reports of all the wells of that company, produced graphic charts showing just what each

of these wells had done and the efforts made to "bring them in." These charts were introduced as Exhibits 172, 173 and 174 and constitute a fair summary of what is shown in these drilling and operating reports, which were produced in connection with his testimony and fill 521 pages of the record. (Tr. 3157-3168)

The auditor of the Associated Oil Company, P. G. Williams, testified from his records that this company had spent the sum of \$517,613.94 in development in the Elk Hills, and had produced in all 30,327 barrels of oil from its wells there. (Tr. 3122-4) W. E. White testified that these wells were handled just as any other well would be, and that every effort was made to make them produce. (Tr. 3170) There can be no reasonable doubt that this statement is the truth, as an analysis of the daily reports of the wells shows beyond question. They were shut down on August 23, 1912 (Tr. 3156). There was no drilling and nothing was being done by the Associated Oil Company in the Elk Hills. (Tr. 3173)

In the effort to give some semblance of truth to the claim that the graphic logs or charts, prepared by the witness White, do not state the facts, government counsel went to the trouble to add up on these charts the daily "estimates" of production. He finds that the total thus obtained is far greater than the "Actual Monthly Total" appearing on these charts and therefore concludes that Mr. White in-



tentionally misrepresented the true production of these wells. We are not interested particularly in refuting this sort of an argument, but are calling attention to it as one more instance of the many unfounded statements concerning these wells. The witness explained that these daily estimates were at best only guesses and that it was the common experience in the oil fields that they ran much too high when compared with the actual *measured* production as shown at the end of each month. (Tr. 3206, 3250, 3381-2) The argument of government counsel that the daily records of these wells showed that there was an actual total production in the amounts he states, is therefore without any real foundation.

To sum up the situation concerning the present condition of the Elk Hills as to being known oil lands, it must be admitted that the even sections, in the western two-thirds of Township 30-23, have been proven not to be oil lands by the development, which has taken place there since 1910. In two even-numbered sections in the eastern third of the township some oil has been found. Whether this oil is in commercial quantity, considering the depth and expense of drilling, is at least open to serious question. According to the testimony of the witness F. M. Anderson, based on amortization tables prepared by him, these wells cannot be made to pay for themselves. (Tr. 2502, 2505, 2516) The burden of proof is on the government to show that these

wells are commercial, and it has not done so. It is to be remembered in this connection that the witness A. C. Veatch gave it as his opinion that the Elk Hills could not be developed commercially at this time and might not be until some time within the next hundred years.

No proof whatever has been offered showing that there is oil known to exist in the *odd* numbered sections involved in this suit. No wells have been drilled in any of these sections and if it is determined that any one of them contains oil it must be because of the discovery of oil somewhere else. Any inferences, based on the discoveries in these three Associated wells, that oil also exists in these odd sections, must survive the counter inference that there is no oil within them, because of the failure to find any in the wells in the even sections in the western two-thirds of the township. No matter how we take it, the existence of oil in commercial or any other quantity in any of the lands in suit is so shrouded in doubt that the Court could not justify a finding that any one section or quarter section is known oil land *today*. If this is true, there can be no finding that any of this land was known oil land in 1904, when the nearest discovered oil was from four to ten miles away from the lands in suit, and when the available drilling appliances would not have made it possible to sink a well to the depths of these Associated wells in the Elk Hills, which were not sunk until 1910.

## VII.

The learned District Judge who decided this case in the court below did not hear the evidence, which was taken before a commissioner; and his conclusion that the patent should be cancelled was based upon a misconception of the meaning and effect of the evidence.

The learned District Judge who tried the case below bases his decree upon conclusions drawn by him from the evidence referred to in his opinion. This evidence was not heard by him, but was taken before a commissioner. These conclusions will now be discussed for the purpose of showing their lack of support in the evidence itself and their legal inadequacy as a basis for the decree.

(1) *Finding that lands were in "recognized oil district."*

His first finding is as follows: "The lands in controversy were, at the time of the proceedings resulting in the patent, within a known and well recognized oil district and had been previously returned by the U. S. Surveyor as oil bearing lands, and at the time the selection list was first filed were within a previous withdrawal order of the department because of their probable oil character."



This finding is erroneous in several important respects. There is no evidence that the lands were "within a known and well recognized *oil district*." The proof is undisputed that they were several miles *outside* of the recognized oil district. The nearest known oil in 1904 was four miles from part of the lands in suit and a greater distance from the rest, with an unproductive valley between. If by the expression "oil district" he meant a district within which locations for oil had been made, his finding is correct, but is of no importance, as locations without discovery prove nothing.

Nor were these lands "returned by the U. S. Surveyor as oil bearing lands" in the sense that there was any oil known to exist in them. The surveyor's return merely reported that there was on these lands "a geological formation with asphaltum exudations, that is regarded by experts as an almost sure indication of the presence of valuable petroleum deposits." (Tr. 686) This is at most but the statement of a speculative opinion. In so far as it mentions "asphalt exudations" it is contradicted even by the numerous government witnesses called in this case, none of whom saw any such asphalt on these lands or near them. Neither Exhibit I nor Exhibit O presented by A. C. Veatch and F. O. Martin, the two leading geological witnesses for the government, indicates any asphalt anywhere in the township in question. There was,

therefore, no real foundation for this portion of the Court's finding.

The testimony on both sides, as heretofore indicated in this brief, proves that at or before the date of the patent in 1904, the Elk Hills District was not considered to be oil territory. The many "wildcat" locations made in these hills in 1899 and 1900, following the Kern River oil excitement, had not resulted in any discovery of oil, or even in a serious attempt to make such a discovery. Before the date of the patent even these speculative locators had given up in disgust. There is, therefore, no basis in fact for saying that these lands lay within a well recognized "oil district".

The finding that these lands had been withdrawn from agricultural entry is not important as evidence of their real character. It is undisputed that this withdrawal was made by the government in 1900 and that it covered a very large area. It is not claimed that it was based on any real determination of the intrinsic character of the land itself. The withdrawal order was not *proof* of oil in the land. Therefore it does not support the finding of the Court.

The only proper bearing of this withdrawal order of 1900, as well as of the erroneous return of the government's surveyor, is upon the action of the government itself. When the railroad application was received, the surveyor's return and this withdrawal were matters of official record in the United

States Land Office. They served to put the government on its guard. Because of them the government disregarded the formal selection affidavits made by the railroad company and sent one of its own agents, E. C. Ryan, to examine the land. He did examine it and reported that it contained no oil. Thereupon the patent was issued.

In another portion of his opinion the learned District Judge seeks to negative the force of this Ryan report by pointing out the fact that Ryan was not an expert. Be that as it may, he was the man selected by the government to make this examination, and his report was accepted and acted upon in releasing the withdrawal order and patenting the lands. There is no evidence that his designation to make the examination or his report was procured or influenced in the slightest degree by the railroad company.

(2) *Finding as to agricultural character of lands.*

The next conclusion of the learned District Judge concerns the character of the land sued for. It reads as follows:

“They are rough, broken, arid lands of no substantial value for agricultural purposes or any other purpose than their oil contents.”

The inference obviously sought to be drawn from this finding is that the railroad company could not have desired these lands except for their supposed oil value. But the evidence does not support either the finding itself or the inference sought to be drawn from it. It is abundantly shown that these lands are valuable for grazing. (Tr. 121, 191, 1982-4, 2044, 2046, 2111-15). It is also in evidence that C. W. Eberlein, the land agent of the railroad company, understood when he selected these lands that there was a shortage in the land grant of the Southern Pacific Railroad Company and that there were not sufficient surveyed lands within the indemnity limits to supply deficiencies in the place limits. (Tr. 1154-6) So it was not so much a question as to the value of these lands for agriculture or grazing as it was whether the company would receive *any indemnity* for its losses within the granted limits. It was forced upon the railroad company to take these lands or none at all. The government gave its land grant to aid the railroad in its construction through an arid region. It was therefore no indication of a fraud when the company selected the lands the government had given even if the selected lands had little apparent value.



(3) *Finding that C. W. Eberlein did not have lands examined.*

The third finding of fact made by the learned District Judge is as follows:

“The statement in the affidavits of Eberlein that he has caused the lands to be carefully examined by the agents and employees of the company as to their mineral or agricultural character was and is untrue. This is admitted.”

This finding is not true. In the first place, it was not “admitted” at the trial or during argument that the lands had not been examined. On the contrary, it was asserted and proven that they had been examined. C. W. Eberlein, the land agent of the railroad company who made the selections and the affidavits in question, was called as a witness by the government and said: “That list of lands was made by my order on representation to me that it was non-mineral by my assistant who was fully informed.” (Tr. 1114). “He was thoroughly familiar with the lands, so he told me.” (Tr. 1088). On being asked if he had sent anyone to examine these lands specially he said: “I didn’t consider it necessary. Stone was familiar with the land—claimed to be.” (Tr. 1137).

George A. Stone, the assistant referred to by Eberlein, who was the field examiner of the company at the time of the selections, was called as a witness by the government and testified as follows:

"I supervised the preparation under Mr. Eberlein's direction. \* \* \* I am acquainted with selection list No. 89 of the main line grant and had to do with its preparation. \* \* \* I am acquainted with the township just east of McKittrick, but don't remember its number just now. It is probably 30-23. \* \* \* Such knowledge as I had of the lands was general in character from my general knowledge of the country. I had been frequently in the country for two years preceding." (Tr. 1028-9)

There is no testimony modifying or contradicting this. It therefore appears as an undisputed fact that Stone as land examiner for the company was familiar with this land as a result of his frequent trips into that country. Whether or not his examination was sufficient is not important in this connection. The testimony of Eberlein indicates that he believed that Stone was "fully informed". As he acted under such belief the fact that Stone may not have made a thorough or careful examination does not affect the good faith of the Eberlein affidavit. The execution of the affidavit was therefore not in itself any evidence of a fraudulent purpose although the Court below seems to have so considered it.

Nor is the fact important, which is mentioned by Judge Bean, in this connection, that Eberlein did not have these lands examined by geologists then in the employ of another department of the company. These men were not subject to his orders.

Moreover, there is no showing of any circumstance suggesting to him that such an examination was required. If he had procured a report from these men there is no doubt that they would have told him, as they did inform those to whom they did report, that these lands were "too far out" to be oil lands.

In this connection it must be borne in mind that Eberlein knew soon after he filed his selection list that the government had itself caused those very lands to be examined and had pronounced them not to be oil lands. Whatever occasion there might have been for him to cause a special examination to be made was removed by the act of the plaintiff itself. So far as Eberlein knew Ryan was as much of an expert as anyone he could have procured.

*(4) Finding that Eberlein correspondence showed knowledge of mineral character of land.*

The fourth finding of the Court below is too long for convenient quotation at this place. Its substance is that it "clearly appears from the documentary evidence in the case, and particularly from the correspondence from Eberlein's files \* \* \* that at the time the selections were made and the patents issued, the officers of the Company in charge of the matter were conscious that the lands were if not actual at least probable oil bearing, and that the selections were made and strenuously urged to

patent for that reason, and not because of their agricultural value."

The Court then proceeds to discuss and quote portions of the correspondence thus referred to, in the effort to support the above conclusion.

In our opinion, this correspondence has been given an importance out of all proportion to its real significance. In fact, in the decision of the lower court it almost entirely displaces discussion of the real issue of the case as to whether the lands sued for were in fact mineral in character and known to be such. Properly considered in the light of the other facts in the case, this correspondence not only does not indicate fraudulent knowledge or purpose, but it proves the very contrary, as we shall point out.

Before taking up the discussion of the lower court's finding regarding this correspondence, we desire to have this Court understand exactly what we consider to be the greatest possible legal bearing these Eberlein letters can have on the real issues of the case. Taken in their most unfavorable light, they can be claimed to show no more than that Eberlein may have *thought* oil might be discovered in the lands for which he was seeking a patent. This would be mere conjecture on his part and not knowledge that the lands actually did contain valuable oil deposits. Nothing short of such knowledge will satisfy the charge of fraud here made. The only permissible use of these letters, therefore,



would be to show a wrongful or fraudulent *purpose* on his part. Whether or not such purpose, if found to have existed, resulted in fraudulent and actionable *damage* to the government, must depend on other evidence in the case concerning the actual character of the land sued for and what was really *known* about it.

In connection with these Eberlein letters one important fact must be noted. These letters, with one exception, were produced by Eberlein from a file he had carefully retained in his possession for a number of years after he left the service of the Railroad Company in 1908. During the San Francisco fire of 1906, these letters were badly charred and burned. Although they were then practically destroyed he had copies made from their charred remains and kept these copies until they were produced in court. There is nothing to show that he did this because of any desire to injure the Railroad Company. On the contrary, he testified that he kept this file for his own "protection". He said that Judge Cornish, his superior officer in charge of land matters, told him to "keep it close for my own protection as well as his own." (Tr. 1279-80). As appears throughout his testimony, he and Judge Cornish were strenuously opposed to having a lease made to the Kern Trading and Oil Company in 1904, covering a large area of actual and possible oil lands, which would otherwise have remained under the dominion of Eberlein himself. His letters

contain a host of arguments against such a lease. It is evident that he intended to defeat this lease at any cost. In fact he never did sign it or consent to it in any way up to the time he resigned in 1908, although he admits that he had known from 1904 that the lease was actually in force and being acted upon by everyone else although unsigned by him. (Tr. 1221)

Guilty men do not ordinarily so carefully preserve the evidence of their own guilt. If these letters do in fact manifest a guilty purpose, Eberlein, who wrote them, must have been aware of it. Then, why should he have so carefully preserved them, and why should he have taken such care to restore them after the 1906 fire? The only explanation consistent with ordinary experience and probability is that he did not think they indicated a fraud on his part. His only thought seems to have been that these letters would be a "protection" to him in case it should be claimed at some time that he had acquiesced without protest in the operation of a lease depriving his department and the Southern Pacific Railroad Company of control over such a large body of lands. He testified that he feared E. H. Harri-man might sometime call the matter into question (Tr. 1256)

Eberlein belonged to the New York office of the Railroad Company. In 1903 he was sent to California by W. D. Cornish, who was Vice President of the Southern Pacific Railroad Company and in

charge of its land matters. This was done at the suggestion of E. H. Harriman for the purpose of having Eberlein investigate railroad land matters in California. As already mentioned earlier in this brief, the manner of his appointment and the character of his mission brought him into frequent "collision" with other officers of the Company. (Tr. 1223)

Shortly after his arrival in California, he was made acting land agent of the Southern Pacific Railroad Company by reason of the retirement at that time of Jerome Madden, who had been land agent for a number of years previously. This was in August, 1903.

He at once discharged every employee in Madden's office, except George A. Stone, whom he made his assistant. (Tr. 1188). His attention was early called to the fact that the Company had lost a large amount of indemnity lands because of failure to make prompt selections. (Tr. 1154-5). His attention was also called to the fact that Township 30-23 in the Elk Hills, in which the lands now sued for are situated, had been recently surveyed. "I know I could not understand," he says, "why they hadn't selected it at once. It was always the plan in my time to immediately get after indemnity as soon as it was surveyed." (Tr. 1157-8). There is no doubt he urged this selection vigorously as such was his habit. "Mr. Eberlein," testified Julius Kruttschnitt in this case, "was a nervous, energetic, stren-

uous person; everything he went into, he went into apparently heart and soul as if it were the only thing to be attended to." (Tr. 3090).

On November 14, 1903, he filed his selection list for the lands now in suit. This list was rejected by the local land officers because the lands were within the area which had been withdrawn from agricultural entry by the government in its blanket order of February 28, 1900. (Tr. 1159-60). An appeal was taken by the Railroad Company from this rejection on December 11, 1903. (Tr. 3864).

In connection with this appeal, Eberlein wrote his letter of December 10, 1903, (Tr. 1577) to D. A. Chambers, who was the attorney for the Railroad Company in Washington, D. C. This is the first letter quoted in the opinion of the Court below as an indication of fraud. In this letter, after complaining in his characteristic way because the appeal had been signed by some one in the law department of the company instead of by himself, he says:

"I am particularly anxious in regard to this list as the lands adjoin the oil territory, and Mr. Kruttschnitt is very solicitous in regard to it.

"I have had in mind the suggestion you made some time ago in regard to inducing Mr. E. C. Ryan, Special Agent at Los Angeles, to make his report.

"I am not acquainted with Mr. Ryan, and



it is a matter for serious consideration as to how to approach him.

"It would not do, certainly, to ask for a report recommending the release of the lands selected by us from suspension. In my opinion it would not be politic to ask for a release in any particular district.

"Mr. Ryan would, in all probability, jump at the conclusion that the railroad had some special information in regard to that district, and the result would probably be that our request would have the opposite effect from that desired.

"All that I could do would be in a general way to ask him to submit a report of the lands covered by the order of suspension, which, as you know, embraces a very large area.

"How would it do to ask the Department to suggest to Mr. Ryan that he make a report of so much of the lands within the suspension limits as he has examined up to this time.

"It might be that such a report would cover the very district in which we are operating, and we would then be relieved from the danger of having called particular attention to any locality." (Tr. 1578.)

Mr. Kruttschnitt was then General Manager of the Railroad Company in charge of the operation of its trains. He was also assistant to the President, E. H. Harriman. He testified in this case that he had been directed by Harriman to assist Eberlein in his work generally, but that he had

nothing to do directly with the selection of lands for patent. On being asked if he were specially interested in the lands now sued for, he said: "I was not. My interest was simply and solely to carry out the instructions of my superior officer, the President, to help matters on that Mr. Eberlein was engaged in." (Tr. 3094). He further testified that in 1903 he had no information or belief derived from Eberlein, or from any other source, that the lands in question were or might be oil lands. (Tr. 3083, 3089).

It is probable that Eberlein thus used Kruttschnitt's name merely in order to stir Chambers into more rapid action. The tone of the entire letter indicates that he suspected lack of enthusiastic cooperation on the part of the Company's law department with which Chambers was connected. The letter is singularly frank and open, yet it contains no statement indicating that he then even thought the lands he had selected were *within* the oil territory. All he says is that they *adjoined* the oil territory. This was to a certain extent the fact as they lie from four to ten miles east of the then known oil territory. We have already noted that he was greatly concerned because of the large losses of indemnity lands the Company had already suffered. Possibly and probably he feared that this land, because of the mere fact that it was near an oil district, might be taken up by speculators if the company selections were not promptly approved. In

one of his later letters to be hereafter quoted, he refers to this very danger.

The references in this letter to E. C. Ryan, the government's special agent who later examined these lands, prove beyond question that the acts of Ryan were in no way influenced by the railroad company. In fact, Eberlein quite evidently feared that Ryan would, on general principles, report adversely if he were informed that the railroad company was interested. He and Ryan both testified that no oral or written communication passed between them.

Following the appeal mentioned in this letter, E. C. Ryan was directed by the Commissioner of the General Land Office to examine these lands. He made this examination in January, 1904, and reported that they were not oil lands. (Tr. 1549) As a result, the general withdrawal order of February 28, 1900, was canceled as to these lands and the application of the railroad company was accepted and patent was finally issued on December 12, 1904. In the meantime, as already stated earlier in this brief, the application was duly advertised in a local paper for eight weeks. On September 6, 1904, an amended selection list was filed by Eberlein for the purpose of correcting the description of the base lands in lieu of which a patent for the lands now in suit was asked. This was a mere clerical correction, no change being made in the selected lands themselves. During all this time

there is no evidence that any information had come to Eberlein or anyone else connected with the company to indicate that there was oil in these lands. In fact, no such information could have come as no development had taken place in the lands and no oil had been discovered except that from four to ten miles away, in a different range of hills.

Beginning early in 1903, E. T. Dumble, consulting geologist of the Southern Pacific Company, acting under orders from Julius Kruttschnitt, had been arranging to have the operating department of the railroad company take possession and control of all patented lands then thought to be actual, probable or possible oil lands. Prior to that time, Jerome Madden, who had preceded Eberlein as land agent, had sold large areas of land near Bakersfield for \$2.50 an acre, many of which lands later proved to be valuable for oil. On account of this, the operating officials of the company, who wanted the oil for locomotive fuel, decided to take the control of all possible oil territory from the land department, in order to prevent similar sales. (Tr. 3085) Pursuant to this plan, Mr. Kruttschnitt caused the Kern Trading and Oil Company to be organized in May, 1903, to act as the fuel bureau of the Southern Pacific Company. (Tr. 3085). He instructed Dumble to have the lands of the Southern Pacific Railroad Company examined for the purpose of determining what lands should be taken over. Dumble had an examination made by his



geological assistants, Josiah Owen and F. M. Anderson, and reported the results to Kruttschnitt in his letter of September 21, 1903. (Ex. 119. Tr. 2912). The map submitted with this letter (Ex. 156) shows the lands which were to be taken near McKittrick. The fact that the lands now sued for were not then patented was, of course, sufficient reason for excluding them from this map, since only patented lands were included in its designations of actual, probable and possible oil lands. But the company did own at that time at least ten other sections of land in the Elk Hills as favorably situated as the lands now in question. (See Ex. 197). None of these were listed by Dumble as being even *possible* oil lands although he was unaware at that time that the lands now sued for were to be selected. In fact, he knew nothing of the selections until late in 1904. (Tr. 2953). His exclusion of these patented lands in the Elk Hills in 1903 clearly indicates that he and his associates did not at that time consider them to be even possible oil lands.

Finally, on April 1, 1904, the Kern Trading and Oil Company took possession of all of the oil properties of the railroad company, including the management of various sub-leases to individual operators. The formal lease of the lands Dumble had designated in his letter of September 21, 1903, was not then completed but was in course of preparation in the law department.

This lease, covering the lands Dumble had designated on his map of September, 1903, was finally completed and signed by C. H. Markham, as Vice President and General Manager of the Southern Pacific Company, and President of the Kern Trading and Oil Company. On August 2, 1904, Markham presented it to Eberlein and asked him to sign it as Land Agent of the Southern Pacific Railroad Company, the lessor. (Tr. 1111). Eberlein refused to do so and the further correspondence, quoted by the Court below as proof of fraud, followed this refusal and the insistence of Markham that the lease should be executed.

The first letter referred to by the learned District Judge in this connection was written by Eberlein to his superior officer, Judge W. D. Cornish, who was in New York. This letter was dated September 3, 1904, and appears in full at page 1075-9 of the record. As it is long, only portions will be here quoted. It begins with a complaint about the Kern Trading and Oil Company. "I am totally in the dark", he says, "as to the objects, rights, etc., of this corporation. I have asked for information several times, but it has never been furnished me."

He then speaks of the proposed lease and says: "This lease was concocted without any reference to me, and it has now been sent over for me to execute on behalf of the Southern Pacific Railroad Company. \* \* \* Inasmuch as the lease is made by the Land Department and the head of

that department is taking responsibility therefor, it does not seem proper that the Southern Pacific Railroad Company shall have nothing to say in regard to the disposition of its royalty oil. \* \* \* As I have already stated, this matter has been hatched for my signature without submission to me and without consultation."

This portion of the letter, which was apparently not noted by the Court below, shows that Eberlein's real reason for refusing to sign the lease was because it had been "concocted" without reference to him and because it would remove such a large body of lands from the control of his department. The letter contains many objections to the lease, generally and as to details, which were obviously added to make his stand as strong as possible.

He seemed to fear that if he signed the lease without formal authority from the directors of his company, his action might be questioned at some later time. "Do you think," he says in this letter to Judge Cornish, "it would be wise and expedient and would it serve the purpose of *protection* if I were to demand action of the Board of Directors of the Southern Pacific Railroad Company ratifying and confirming the lease as it stands, and directing the land agent to sign the lease? (Italics ours.)

We have already noted the fact that when called as a witness in this case he stated that he had carefully preserved this letter and others for his "protection." Undoubtedly he used this word in the

same sense on both occasions. In his testimony in speaking of this very letter he said: "All I wished in that case was that all of these different matters be put forth in the light in which they appeared to me and then let my superior officer take the responsibility. \* \* \* It looked to me like a very serious thing for a man who was less than six months in as complicated a position as that is, and without any information except what he could glean, to take the responsibility for such a lease as that." (Tr. 1238.)

Apparently the operating officials of the Company were quite insistent that the lease should be executed at once, notwithstanding Eberlein's objections, for Eberlein asks Judge Cornish to telegraph him what to do. He assures Cornish that he can prevent immediate action while awaiting reply. This is the portion of the letter quoted by the Court below: "I can stave off the delivery of this document", says Eberlein, "for some time yet, I think, for the reason that if the knowledge of this lease becomes public property it will probably cause us a great deal of trouble in the United States Land Office, and may result in the loss of a large body of adjacent lands which may hereafter turn out to be mineral and oil bearing."

It is to be noted that he here speaks in terms of conjecture merely. He says that the lands "may *hereafter* turn out to be mineral." He had no knowledge, or even belief, that they were in fact mineral



lands. No such knowledge was then possible in the state of development in that region. He was merely speculating on a remote chance, which was probably far less real to him than was his strong desire to defeat the lease at any cost. This is further shown by the concluding paragraph of the same letter where he says: "If it becomes known that we have executed a lease of lands interspersed with those already under selection by us, and that the lease is for oil purposes, it seems to me that it will immediately encourage oil speculators to file upon the lands so selected and that the government will have good ground for refusing patent, inasmuch as we practically fix the mineral status of the land by this lease."

It is apparent from this language that if Eberlein really had any fear concerning the possible effect of this lease on the pending selection list, it was a fear concerning an *appearance* rather than a fact.

He states that speculators might file on the land because of its propinquity to lands leased to the Kern Trading and Oil Company. He seems to have thought that the leased lands were "interspersed" with those he had selected, which was not the fact as they all lay to the southwest of the selected lands.

This was a confidential and intimate letter to his immediate superior, yet he gives no hint that he really thinks the lands are in fact oil lands. On the contrary he calls Judge Cornish's attention to

the fact that the government had examined them and found them not to be oil lands. As he stated in his testimony in this case, what he feared was not any disclosure of *fact* concerning the character of these lands, but that the lease would create a *presumption* which would be false and contrary to the facts as he knew them. He feared that this presumption might be seized upon by the government as an excuse for delaying or denying the patent.

On September 10, 1904, Eberlein wrote a somewhat similar letter to C. H. Markham (Plaintiff's Ex. KK., Tr. 1053-4) In this letter, after objecting at length to the lease upon a variety of grounds, he says:

"In addition to this there is a very urgent reason for delaying the execution of these papers.

"We have selected a large body of lands interspersed with the lands to be conveyed by this lease, and which we have represented as non-mineral in character.

"Should the existence of this lease become known it would go a long way toward establishing the mineral character of the lands referred to, and which are still unpatented.

"We could not successfully resist a mineral filing after we have practically established the mineral character of the land.

"I would suggest delay at least until this matter of patent can be adjusted."

It is evident from this letter also that Eberlein's real desire was to defeat the lease. Again there is no hint that he has any real knowledge or even belief that the selected lands contained oil. What he feared, according to this letter, was that the making of the lease might "*establish* the mineral character of the lands." This meant only that the lease might give them a speculative or presumptive value because of propinquity.

It has already been demonstrated in this brief that at the time these letters were written Eberlein did not have and could not have had any knowledge that the selected lands were oil lands. At most all he could have then possessed would have been a mere conjecture that they *might* turn out to be oil lands at some time. There had been no development of oil closer than four miles from the nearest section of his selection. He had not seen the lands himself and had been assured by his assistant Stone and by the government report on these lands that they were not oil lands. Possibly he had the notion, which is common to many who know nothing about oil, that it might be found nearly anywhere provided the drill went deep enough. But there is nothing in these letters or elsewhere to show that he really thought these lands were in fact oil lands. Yet, these letters were taken by the Court below to indicate a "knowledge and belief" on his part that the statements in his selection affidavits were untrue.

We respectfully submit that this application of these letters was prejudicially erroneous.

The conduct of those who had prepared this lease proved that they were not aware of anything wrong. The lease was arranged for by E. T. Dumble, under the direction of his superior in the operating department, Julius Kruttschnitt. Later, C. H. Markham succeeded Kruttschnitt as General Manager, but Dumble continued to be in active charge of the company's oil interests, present and prospective. His assistants, Owen and Anderson, were in the field examining possible oil lands and reporting to Dumble from time to time.

As Eberlein had no personal knowledge of the lands now in suit and no direct interest in procuring more oil lands it is to be presumed, if there was a fraudulent plan to select these lands for oil purposes, that the suggestions must have come from Dumble or some one in his department. If such a plan existed either he or Kruttschnitt or Markham must have either originated it or learned of it sooner or later. Realizing this the government has sought to show by the uncertain speculations of the aged and decrepit witness Geo. A. Stone that Dumble may have "suggested" to Eberlein that these lands be selected. (Tr. 1029). Both Dumble and Eberlein emphatically deny this (Tr. 2927, 1120, 1136, 1314).

After Eberlein wrote his letter of September 10, 1904, which we have quoted above, Markham and



Dumble still insisted that the lease be executed. Eberlein has testified that Markham was quite insistent that it be signed. (Tr. 1170). Markham sent the Eberlein letter of September 10, 1904, to Dumble, for his consideration, and on September 19, 1904, Dumble replied, stating in effect that Eberlein's objections were unfounded. (Tr. 2950) Dumble testified that he did not remember seeing anything in Mr. Eberlein's letter about the effect of the lease upon the selection list. (Tr. 2951). It is quite possible that he paid no attention to this part of the letter because of the fact that he knew nothing making it of interest or concern to him.

After Markham received Dumble's reply of September 19, 1904, he wrote Eberlein on September 21, 1904, asking him "whether there is anything in the lease that is really objectionable." (Tr. 1061) Other correspondence passed between the two offices, Markham at all times pressing the execution of the lease. Eberlein, as he puts it, was "sparring for time" until he could hear from Judge Cornish. (Tr. 1219). But Cornish never saw fit to interfere, although he knew that the lease had actually been put into operation without Eberlein's signature. (Tr. 1242-5).

If Dumble or Markham or Kruttschnitt had in mind the fraudulent selection of these Elk Hills lands, their conduct was curiously inconsistent. If they were guilty, the Eberlein letter must have in-

stantly put them on their guard. As thinking men, if they were engaged in a fraud, they would at once have taken steps to obviate the danger Eberlein had suggested. They could have done this readily by changing the lease so as to cut out all lands near the Elk Hills, especially as such lands were then and are now undeveloped and of slight prospective value for oil. They also must have known that the mere signing of the lease itself was a matter of slight consequence, as an advertisement to the world of what they believed to be oil lands, compared to their visible acts of operation and control of the leased lands in the field itself. Yet, despite the protests of Eberlein, they proceeded with their operations just as if the lease had been formally executed. (Tr. 2954) Not the slightest change seems to have been made by Dumble and his associates in the course they had already outlined. This is not consistent with the existence of a fraudulent purpose on their part.

The only thing done by Dumble in compliance with Eberlein's desire was the letter he wrote to W. H. Bancroft, who had succeeded C. H. Markham as General Manager, on December 7, 1904. (Tr. 2953). In this letter he said: "In connection with our correspondence regarding the transfer of property to the Kern Trading and Oil Company, I have had a conversation with Mr. Eberlein and it seems for reasons of policy regarding certain unpatented lands that it will be best not to execute the lease

of lands between Southern Pacific Railroad Company and the Kern Trading and Oil Company at present." Dumble testified that he sent this letter after a conversation he had with Eberlein at about the time the letter was written and not on October 6, 1904, as erroneously stated in the opinion of the Court below. He further testified that he wrote it simply out of deference to Eberlein's wishes and not because he thought the matter important. He further explained that the failure to have the lease signed was a matter of utter indifference to him at the time as the Kern Trading and Oil Company was openly operating on the land described in the lease just as if the lease had been signed. (Tr. 2954)

It is quite evident that Kruttschnitt, Markham and Dumble fully understood that Eberlein's real desire was to prevent any lease whatever in order that he might retain the control of the lands covered by the lease. Kruttschnitt testified in this connection: "He knew I had instructions to develop oil on the lands of the Company, and I have never been able to trace his objection to signing the lease to anything except pique because he had not been consulted and he considered himself slighted." (Tr. 3088) Even after he obtained the patent on December 12, 1904, Eberlein continued to refuse to sign the lease or to admit its existence. As late as February 6, 1907, he wrote a letter to the Auditor of the Railroad Company denying knowledge of any



such lease. (See Defts. Ex. 148) (Tr. 2055) At this time he knew that a search was being made for a copy of the old lease following the destruction of the company's records by the fire of 1906. On December 12, 1907, a new lease was drawn up between the Southern Pacific Railroad Company and the Kern Trading and Oil Company. So well was Eberlein's attitude understood at that time that this lease was signed on behalf of *both* companies by E. E. Calvin, who was Vice President of one, and President of the other. (Defts. Ex. 152, Tr. 2961). Eberlein testified that he and Judge Cornish refused to recognize this new lease. (Tr. 1276)

This new lease did not include any of the lands now sued for, although at the time it was executed they had been patented for three years. It included a much larger area than the 1904 lease. In making it up Dumble sent preliminary lists of lands to his field geologists, Owen and Anderson, with instructions to add such lands as they thought proper, no restrictions being placed on them as to where these additions might be. (Tr. 2960, 1614) Owen died before this suit was brought, but Anderson testified that he and Owen worked together and they were at liberty to go where they pleased. (Tr. 2427, 2412-15) He further testified that he did not include the lands now in suit in his 1907 recommendation because at that time he did not consider them oil lands. (Tr. 2728, 2724-9).



If Dumble and his superiors had been aware in 1904 of anything wrong which the execution of the lease of 1904 might have exposed, it is not likely that they would in 1907 make the same sort of a lease covering the same and additional lands. The statute of limitations had not yet run. The truth of the matter is obvious. They had no consciousness of a fraud at any time, and there was no fraud.

We have discussed these Eberlein letters and the incidents relating to them at much greater length than their real importance warrants. Our apology for doing so lies in the fact that these letters were given a meaning and importance by the lower Court out of keeping with their very slight value in determining the real issue in this case.

We have elsewhere discussed the total lack of *knowledge* possessed by Eberlein or anyone else in 1904 concerning possible oil in the land sued for. Unless such knowledge existed there could be no fraud. It therefore makes no difference what Eberlein *thought* or what interpretation is now sought to be put upon his thoughts at that time. Even if he did *think* that these lands might be oil lands, or that deep drilling might disclose oil in some quantity and of some character, this would not afford a single element of fact for the foundation of this suit, nor tend to prove the allegation of the bill that these lands were oil lands and were *known* to be valuable for their oil contents before this patent issued.

We respectfully suggest that the learned District Judge has been misled by these letters into substituting a mere inference of a *belief* in place of the *knowledge* the law requires, which knowledge must be real and must have some reference to the quality and quantity of mineral actually in the lands sued for.

(5) *Finding as to known oil value of the lands sued for.*

The fifth and last finding of fact made by the Court below reads as follows:

“The only questions upon which I have had any doubt or difficulty is whether the evidence, notwithstanding the matters referred to, is sufficient to show that the patents should be set aside because the lands were in fact known oil lands at the time of the proceedings resulting in their issuance. There had been no actual discovery of oil within the boundaries of the lands at that time, but this was not necessary to determine their oil character. Oil like coal occurs in stratified forms of deposit, or rather migrates into and permeates stratified deposits and follows them persistently and continuously, unless interrupted by some intrusion, to the end.”

Then follows a statement that the structure of these lands, “their proximity to and the known extent of oil development and oil sands to the south

and west and extending out and towards the lands in question, the seepages *on or near* the lands and the anticlinal structure thereof, and the then known surrounding conditions" were clearly such as to engender the belief that these lands contained a profitable amount of oil.

This finding involves the only real issue in the case, and should therefore be carefully analyzed. It is first to be noted that the Court admits the existence of real doubt as to its accuracy. Evidently the testimony upon which it was based was not of the "clear and convincing" character demanded by the decisions. If the important and controlling issue of the case is thus left in doubt, the decree should have been for the defendants.

This fifth finding is an obvious attempt to bring this case within the ruling of the Supreme Court in the case of *Diamond Coal Co. v. United States*, 233 U. S. 236, where it was found that certain land contained coal, although there were no developments on the land itself. But, in that case, the areas in suit were comparatively limited, outcroppings of a coal seam or bed appeared on both sides of the land, and on one side this coal bed had been mined profitably up to within a *few feet* of the land sued for. The Supreme Court in that case did not decide what Judge Bean seems to assume that they did decide, namely, that a showing of mere *belief* of mineral is enough. What they did decide was that the bed of coal had been convincingly shown

to be a *fact* beneath the land sued for. The opinion must be considered in its entirety to appreciate its real meaning. The ultimate conclusion of the Court in that case is thus expressed at pages 247 and 248 of the opinion:

“We think the evidence, rightly considered, shows with the requisite certainty that at the time of the proceedings in the land office the lands were *known* to be valuable for coal.  
\* \* \* The outcrop, the disclosures in the vicinity, and the geological formation pointed with convincing force to a workable bed of merchantable coal extending under the valley and penetrating these lands.”

There is nothing in the opinion of the Supreme Court in the Diamond Coal Case to indicate that it was the purpose to change earlier rulings by substituting mere *belief* or speculation as to the existence of minerals for the *fact* of that existence. If the ruling of Judge Bean in this respect is correct, the government would be entitled to cancel a patent to lands upon proof that the applicant, or others, *believed* these lands to be valuable for oil at the date of the patent, even though, at the date of the suit, it had been conclusively demonstrated by drilling that there was not a drop of oil in these lands. In fact, the Court below did make this very ruling as to the lands in the western part of the township sued for, the evidence showing without dispute that numerous deep wells had been drilled in the even



sections on that part of the township without discovering oil. The witness John Lang, an experienced oil man, testified that these were not oil lands. (Tr. 1968) Yet, the District Court finds that they were by its erroneous application of the Diamond Coal case.

If the ruling of the District Court is good law, we have this practical result. The government can have a railroad patent set aside for fraud upon a showing of *belief* that there was oil in the land sued for. Thereupon, if it has in the meantime been discovered that there is no oil in the land, it will be the duty of the government to issue another patent to the railroad company in compliance with the terms of the original grant. The law does not contemplate such a ridiculous situation. The government cannot get the extraordinary relief it here asks unless it has suffered *damage*. If the lands are not *in fact* oil lands there is no damage and the railroad company has gotten no more than it was entitled to. There can be no relief unless a fraudulent representation has actually caused legal damage. (*Southern Development Co. v. Silva*, 125 U. S. 247.)

In the case of *Iron Silver Mining Co. v. Reynolds*, 124 U. S. 174, the Supreme Court, in passing upon a problem identical in principle with our own, said:

“The court below instructed the jury that it was unnecessary to declare what circumstances might be sufficient to affect a patentee with knowledge as prescribed by the statute,

‘for, if, in any case, it appear that an application for a patent is made with *intent* to acquire title to a lode or vein which *may* exist in the ground beneath the surface of a placer claim, it is believed a patent issued upon such application cannot operate to convey such lode or vein;’ and further, that ‘that intention could be formed only upon investigation as to the character of the ground, and the belief as to the existence of a valuable lode therein, which would amount to knowledge under the statute.’

“This instruction is plainly erroneous. The statute speaks of acquiring a patent with a knowledge of the existence of a vein or lode within the boundaries of the claim for which a patent is sought, not the effect of the *intent* of the party to acquire a lode which may or may not exist, of which he has no knowledge. Nor does it render belief, after examination, in the existence of a lode, knowledge of the fact.

“There may be difficulty in determining whether such knowledge in a given case was had, but between mere belief and knowledge there is a wide difference. The Court could not make them synonymous by its charge and thus in effect incorporate new terms into the statute.”

This language is directly applicable to the present case. Mineral quality is a fact. In order to be *known* it must exist. Mere belief, no matter how strong, cannot take its place. The burden is upon the government to prove this mineral character

as a *fact*, not as a mere suspicion or conjecture. All that the Diamond Coal Case holds is that proof of this fact does not require *ocular demonstration* on the land itself.

The Court below in the present case starts off with the assumption that once oil is formed in a stratified formation it will permeate every portion of that stratum "to the end", unless "interrupted by some intrusion". No limit is placed on this supposed migration. It conceivably might extend a hundred miles, if there was no "intrusion". As applied to the present case, it would have to extend many miles, since the lands in suit are from four to ten miles from the nearest oil that was known in 1904.

This initial theoretical assumption of wide diffusion of oil is absolutely necessary if the decree below is to be supported, for there is no proof that oil was known to exist in the Elk Hills in 1904.

But the Court's assumption cannot be supported. It is at variance with all of the evidence of practical and skilled men who have to deal with oil problems. The search for oil is not so simple. No oil man feels justified in drilling a well four to ten miles away from an oil discovery. He would not think for a moment that a discovery of oil on the narrow and limited McKittrick anticline *proved* as a *fact* that there were commercial quantities of oil from four to ten miles away in the Elk Hills, across an intervening valley where the formations carried

water as shown by wells drilled in that direction. The best way to determine what experienced oil men knew and thought is to examine into what they did. The evidence is overwhelming that for years and years they clung to a narrow belt along the main range, from five to fifteen miles away from the Elk Hills. The intervening lands, which must have been of *known* oil value according to the test applied in the present case, were allowed to remain open and unclaimed.

Nor does this test take into account any of the many uncertainties an oil man knows about. There is nothing said about an adequate source for the oil which is to make this long journey; nor about the probabilities of water preventing its migration; nor about the breaking off or alterations of the texture of the strata through which it is supposed to migrate; nor about the possible and even probable absence of sand beds in the Elk Hills, in which the oil could accumulate. These are only a few of the many elements of uncertainty which caused so many witnesses on both sides to refer to the oil business as a "gamble". It certainly has not been shown to be so simple and certain in its problems as the language of the Court below would indicate.

None of the experts for the government venture to say that they knew that there was commercial oil in the Elk Hills. A. C. Veatch, their leading geological expert, admitted that only the drill could determine whether there was commercial oil there;



and further conceded that he did not believe that any oil that might be there could be developed commercially until the remote future. (Tr. 885-9). Dr. J. C. Branner, who is a most eminent geologist, testified merely that the Elk Hills were "suitable for the accumulation of oil", but whether or not oil had accumulated there could be determined only by drilling. (Tr. 1016) Also it is in evidence in this case that in various government geological bulletins concerning the California oil fields, written by Mr. Ralph Arnold, the well-known oil geologist, appears the following statement: "*Any one at all familiar with the conditions and occurrence of petroleum in the California fields knows that any but the most tentative predictions as to the location of oil are extremely hazardous.*" (Tr. 926).

This evidence, as well as a great mass of evidence from practical oil men, pointing out the risks and uncertainties of oil prospecting, was overlooked or disregarded by the learned District Judge. If, as Mr. Arnold says, the prediction of oil in new territory is "extremely hazardous", there is very slight foundation for this finding of the Court below that oil was *known* to exist in the Elk Hills in 1904.

This finding was based on nothing more substantial than speculative conjecture. Oil is not like coal, for the latter stays where nature first put it, and the exposure of a coal bed at one place is strong evidence that the same bed will be found to extend at least a short distance away. But it is not proba-

ble that, even with coal, the Supreme Court would carry the application of its ruling in the Diamond Coal case for a distance of from four to ten miles as is sought to be done here.

The Supreme Court carefully guards against such an application of its opinion. It must have had in mind the peculiar and unusual situation it had to consider in that case. At the end of its opinion it says: "It will be perceived that we are not here concerned with a mere outcropping of coal with nothing pointing persuasively to its quality, extent or value; neither are we considering other minerals whose mode of deposition and situation in the earth are so irregular and otherwise unlike coal as to require that they be dealt with along other lines." In the present case there was nothing pointing "persuasively" or otherwise to the *quality, extent, or value* of any oil in the Elk Hills. Justice Van Devanter, who wrote the opinion in the Diamond Coal case, fully understood that the occurrence of oil is "irregular and otherwise unlike coal." In the case of *Brewster v. Lanyon Zinc Co.*, (C. C. A.) 140 *Federal*, 801, 806, in speaking of an oil field in Kansas, he says: "The field was practically undeveloped and its extent was unknown. Experience in other oil and gas fields had demonstrated that wells drilled in the vicinity of producing wells were not infrequently unproductive. The only method of certainly determining whether or not particular lands contained oil or gas in paying

quantity was by drilling thereon to considerable depth."

This uncertainty in the occurrence of oil has received judicial recognition in this circuit. In the case of *Nevada Sierra Oil Co. v. Home Oil Co.*, 98 *Fed.* 673, 675, Circuit Judge Ross, in speaking of a claim of discovery of oil on an undeveloped tract adjoining another tract in the Coalinga oil district in which there were producing wells, said: "There is evidence on the part of the complainant going to show that Wilson discovered sandstone and shale thereon, as well as on adjoining lands, and that there were seepages of oil on some of the adjoining lands, as also wells on one of the adjoining tracts, which were producing more or less oil. But these were nothing more than indications of existing oil under the surface of the ground in question, which might or might not prove to be true. \* \* \* \*  
Indication of the existence of a thing is not the thing itself."

## VIII.

**The Government officials themselves are of the opinion that the lands in suit are not commercial oil lands and are not suitable for a naval reserve.**

It is a matter of judicial notice, as well as in evidence in this case, that in 1912 a large area in the Elk Hills, including the lands in suit, was by



executive order established as "Naval Petroleum Reserve No. 1", to supply fuel oil for the Navy. Later, it was concluded by the United States Geological Survey that this Reserve No. 1 was not as promising as they had thought. Thereupon, Reserve No. 2 was recommended and established in the productive Buena Vista and Midway region.

Contests at once arose with oil locators on Reserve No. 2 and remedial legislation was sought in Congress to assist these locators, which legislation was opposed by the Navy Department to which branch of the government these reserved lands had been thus assigned. The oil locators on Reserve No. 2 raised the claim that the Navy should be satisfied with Reserve No. 1 in the Elk Hills. The Secretary of the Navy and his subordinates contended, on the contrary, that Reserve No. 1 was of practically no value.

While House Resolution 406 was under consideration by the Senate Committee on Public Lands, an amendment was offered to the bill which was intended to give the locators in Reserve No. 2 some of the relief they asked. A public hearing was had by this committee. (See "*Hearings before the Committee on Public Lands, United States Senate, Sixty-fourth Congress, first Session, on H. R. 406, 'An Act to authorize Exploration for and disposition of coal, phosphate, oil, etc.'*"—Govt. Printing Office, 1916.)



At this hearing Secretary of the Navy Daniels appeared, on Feb. 2, 1916, in opposition to the amendment and said in regard to Reserve No. 1:

"I am not familiar with all those details, and I am going to ask Mr. Landis and Mr. Latham, who have both been upon that land, to give you all the information they have, when I have completed my statement. (p. 210) \* \* \* I have here this morning a geologist and petroleum expert, Mr. Latham, and also Lieut. Commander Landis, of the Navy. These gentlemen have been on these lands and have made a study of them. (p. 220) \* \* \* \* I would like to have the committee hear Mr. Latham and Mr. Landis." (p. 221)

Thereupon Lieutenant Landis, who was the Naval Officer in charge of these reserves, was called and made the following statement: (p. 227)

"The value of Reserve No. 1 is uncertain. Only three wells have reached the oil sand. Their production is uncertain and has been variously estimated at from 40 to 100 barrels a day of a good grade of oil. The field has not been sufficiently developed to enable anyone to accurately estimate its value as a naval reserve. Reports of geologists, opinions of oil men of experience, and all the information available on the subject justify the belief that there is oil in this reserve, but it is known that it is at a great depth, probably 4000 feet or more, and it is not expected that the production even at that depth will be great. It is doubtful if the wells there will prove of com-

mercial value, and it is certain that they could not be operated at profit at the prevailing price of oil. In this field there is no proven land at that portion of it; that which may be said to be partly proven amounts to 2,310 acres, 1440 of which is patented to the Southern Pacific Railroad Co., and has been won by the Government in what is known as the Elk Hills Case. The Navy cannot depend on this reserve for its oil supply."

Mr. E. B. Latham, the geologist and petroleum expert mentioned by Secretary Daniels, was thereafter called and said: (p. 239-40)

"I was shown an opinion as to the suitability of the Naval Reserve. This opinion had been made up, and I agreed with it, and I was asked by the Navy Department to state my agreement to this committee. If you care to ask me any questions as to my reasons, I will be very glad to answer them."

*Senator Works.* "What statement or opinion do you refer to?"

*Mr. Latham.* "Well, it is in substance what has been given you by Mr. Payne and Mr. Landis. \* \* \* I will state it very briefly. In my opinion Reserve No. 2 is entirely suitable for that purpose. Unless the Southern Pacific Lands are lost to the government a reserve can be maintained there in spite of any seepage or depletion of the wells drilled by the parties. In my opinion Reserve No. 1 is not suitable for a reserve. I do not think that the Navy Department should depend upon

that. I do not think it is commercial oil land at all and I think it is very limited in its content of oil."

*Senator Works.* "To what extent has that field been tested?"

*Mr. Latham.* "Why to quite an extent. There were wells drilled almost from one end of the Elk Hills to the other, scattering, and many of them quite deep. One well drilled by Mr. Kinsey went nearly a mile deep without finding any oil whatsoever. \* \* \* \*  
There are some sections, of course, where oil is known to be present. Whether it is there in commercial quantities may be very seriously questioned in my opinion."

### Conclusion.

If the judgment canceling the patent in this case is to stand, it means that any United States patent conveying land may, years after its issuance, be canceled merely on proof that at the time of its issuance there was an oil well in existence from four to ten miles distant from the land at the time patent was issued, supported by no other evidence than the opinions of two geologists that at the time the patent issued an expert geologist would have known that there was oil in the land, who also both testified that the extent and depth of such oil could not be known, and one of whom expressly admitted that, in his opinion, such oil could not have been mined

at a profit at the time patent issued, nor within any definite period thereafter.

If the judgment in this case is to stand, it means also that a United States patent may be canceled, not only upon evidence of the character above mentioned, but also in the face of the uncontradicted evidence that all developments upon the intervening sections of land, subsequent to the issuance of such patent, have demonstrated that there is no oil whatever in the lands in suit, except in so far as it may have been shown by three wells drilled on three sections at the easterly end of the tract in suit, in none of which was oil found in sufficient quantities to meet the cost of production.

If the judgment in this case is to stand, it means, in short, that no title to patented land is secure if a geologist can be found, at any time after the issuance of patent, to express the opinion that other geologists should have known that, at the time the patent issued, the land contained oil, even though it is in the same breath conceded that no human being could tell, at that time, or even at the time the case is tried, whether the oil was where it could be reached, and the testimony of such geologist, even as to the possibility of oil being found in substantial quantity in the land is contradicted by other geologists, equally competent, who were much more familiar with the land, and whose testimony is corroborated by subsequent events.



Appellants confidently submit that the property cannot be taken away from those in whom the legal title is vested by the solemn act of the government itself upon any such testimony as that relied upon by the government in this case.

Appellants believe that a United States patent for land, is still, as it always has been, "something upon which its holder can rely in peace and security in its possession"; that "in its potency it is iron clad against all mere speculative inferences" (*Eureka Case*, 4 *Sawyer* 302); that it cannot be canceled except on testimony "clear, unequivocal and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt." (*Maxwell Land Grant Case*, 121 U. S. 325; *U. S. v. Iron Silver Mining Co.*, 128 U. S. 673; *Colorado Coal Co. v. U. S.*, 123 U. S. 307; *Salone v. U. S.*, 164 U. S. 255; *U. S. v. Stinson*, 197 U. S. 200; *Diamond Coal Co. v. U. S.*, 233 U. S. 236)

The words of Mr. Justice Miller in characterizing the case made by the government in *United States v. San Jacinto Tin Company*, 125 U. S. 273, 300, so fitly describe the present case that we may adopt them as our own summary thereof. "So far," he says, "from there being the satisfactory evidence here pointed out of a fraud against the government having been perpetrated in this case, there is really little but suspicion, fierce denunciation, and a bitter use of such words as 'fraud', 'deceit' and 'imposition'. If the case stood alone upon the testimony

introduced by the government it would, so far as any fraudulent purpose is concerned, do but little more than raise a suspicion that the parties engaged in the transaction sought their own interest at the expense of the government, and not always by the most appropriate means; but when the testimony for the defense is considered it refutes, not only the existence of any such fraudulent intent or dishonest acts, but it removes from the main actors in the matter even the suspicion of having used underhand and improper means for the accomplishment of their purposes."

It is respectfully submitted that the judgment should be reversed with directions to enter judgment for defendants.

GUY V. SHOUP,  
CHARLES R. LEWERS,  
JOSEPH H. CALL,

*Solicitors for Appellants.*

WM. F. HERRIN,

*Of Counsel for Appellants.*



No. 2958.

IN THE  
**CIRCUIT COURT OF APPEALS**  
OF THE  
**UNITED STATES**

---

**Ninth Circuit.**

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UNITED STATES OF AMERICA,  
*Plaintiff and Respondent,*  
VS.

SOUTHERN PACIFIC COMPANY,  
et al.,  
*Defendants and Appellants.*

IN EQUITY.

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**MAPS ACCOMPANYING  
APPELLANTS' BRIEF UPON THE FACTS.**

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GUY V. SHOUP,  
CHARLES R. LEWERS,  
JOSEPH H. CALL,  
*Solicitors for Appellants.*

WM. F. HERRIN,  
*Of Counsel for Appellants.*

Filed

APR 24 1900

F. D. Monckton





R 21E

R 22E.

R 23E.




R 24E

2	1	6	5	4	3	2	1	6	5	4	3	2	1
12	7	8	9	10	11	12	7	6	9	10	11	12	
14	13	18	17	16	15	14	13	18	17	16	15	14	13

T 30 S

OLIG

McKITTRICK

- S. P. Oil Land  
 McKittrick & Midway Districts
-  Oil Land  
 Probable Oil Land  
 Possible Oil Land

Defendant's Exhibit No 120

Copy of plat accompanying letter of Sept 21  
 1903 from E.T. Dumble to J Kruttschnitt  
 (Tr. page 2915)

T 31 S.

6	5	4	3	2	1	6	5	4	3	2	1	6	5	4	3	2	1
7	8	9	10	11	12	7	8	9	10	11	12	7	8	9	10	11	12
18	17	16	15	14	13	18	17	16	15	14	13	18	17	16	15	14	13
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31	32	33	34	35	36	31	32	33	34	35	36	31	32	33	34	35	36
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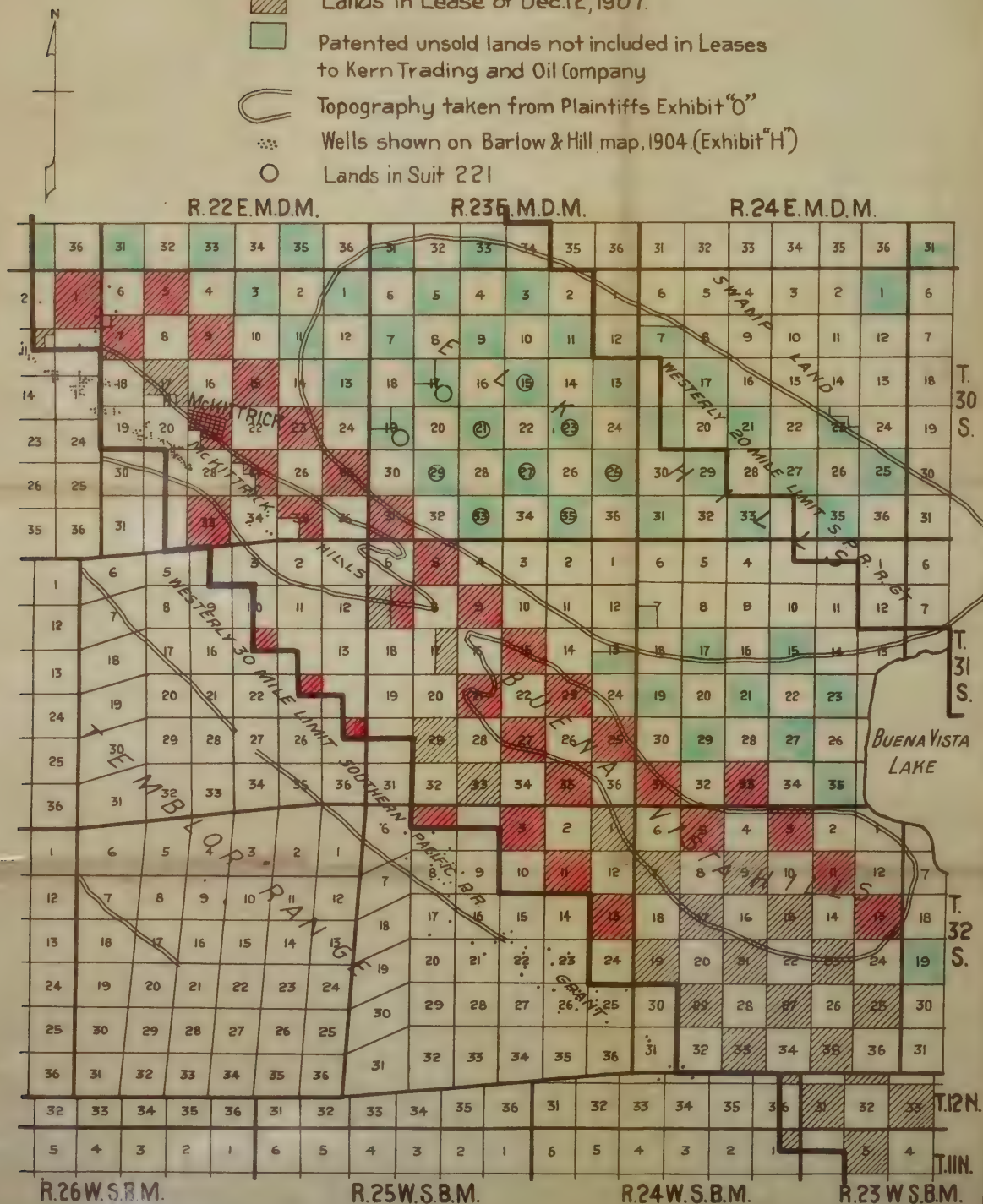
T 32 S.



Plat showing lands in the vicinity of McKittrick included in Lease of S.P.R.R.Co. to K.T. & O. Co. Aug. 2, 1904 and lands included in Renewal Lease of Dec. 12, 1907.

LEGEND

- Lands in Lease of Aug. 2, 1904
- Lands in Lease of Dec. 12, 1907.
- Patented unsold lands not included in Leases to Kern Trading and Oil Company
- Topography taken from Plaintiffs Exhibit "O"
- Wells shown on Barlow & Hill map, 1904. (Exhibit "H")
- Lands in Suit 221



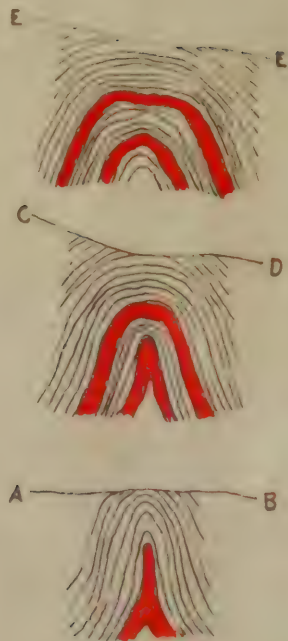


**EXPLANATION:-** The reduced plat of Plaintiff's Exhibit "O" in a separate envelope accompanying this brief contains territory in the McKittrick and Midway Oil Fields, not shown on the above mentioned plat which accompanied appellant's condensed statement, not re-printed; so that the above calculation of the number of "drilled wells," "producing wells" and "dry holes" having been based on said smaller map is incorrect as to such wells upon exhibit "O" accompanying this brief.

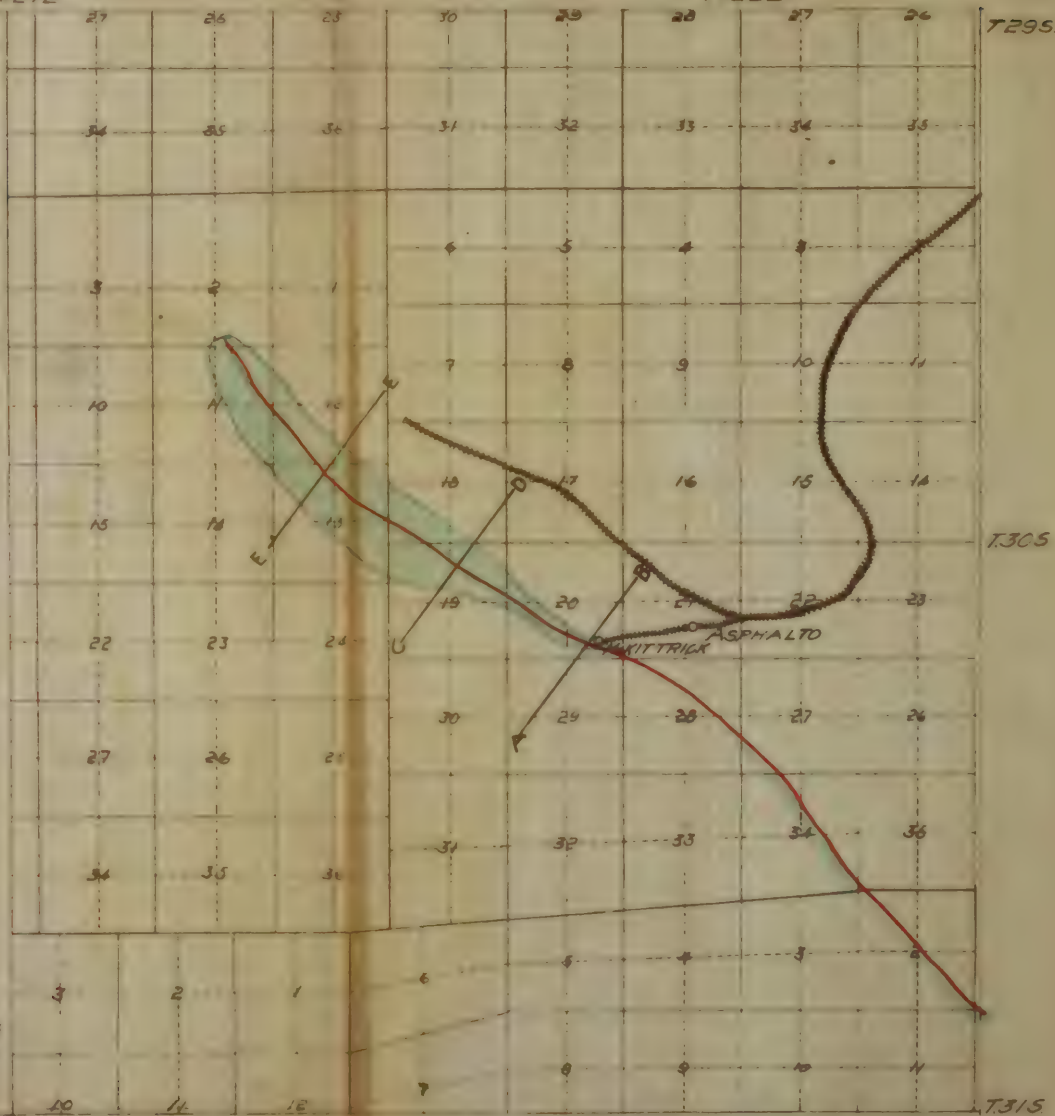
The calculated number of wells and areas upon exhibit "O" accompanying this brief is as follows:

Total number of wells drilled - - - - -	773
Total number which have produced oil or gas - - -	405
Total number of dry holes - - - - -	371
Total supposed oil field in acres - - - - -	116,000
Actual area of oil land proven by drill	
at five acres per well, acres - - - -	2,025

## R22E

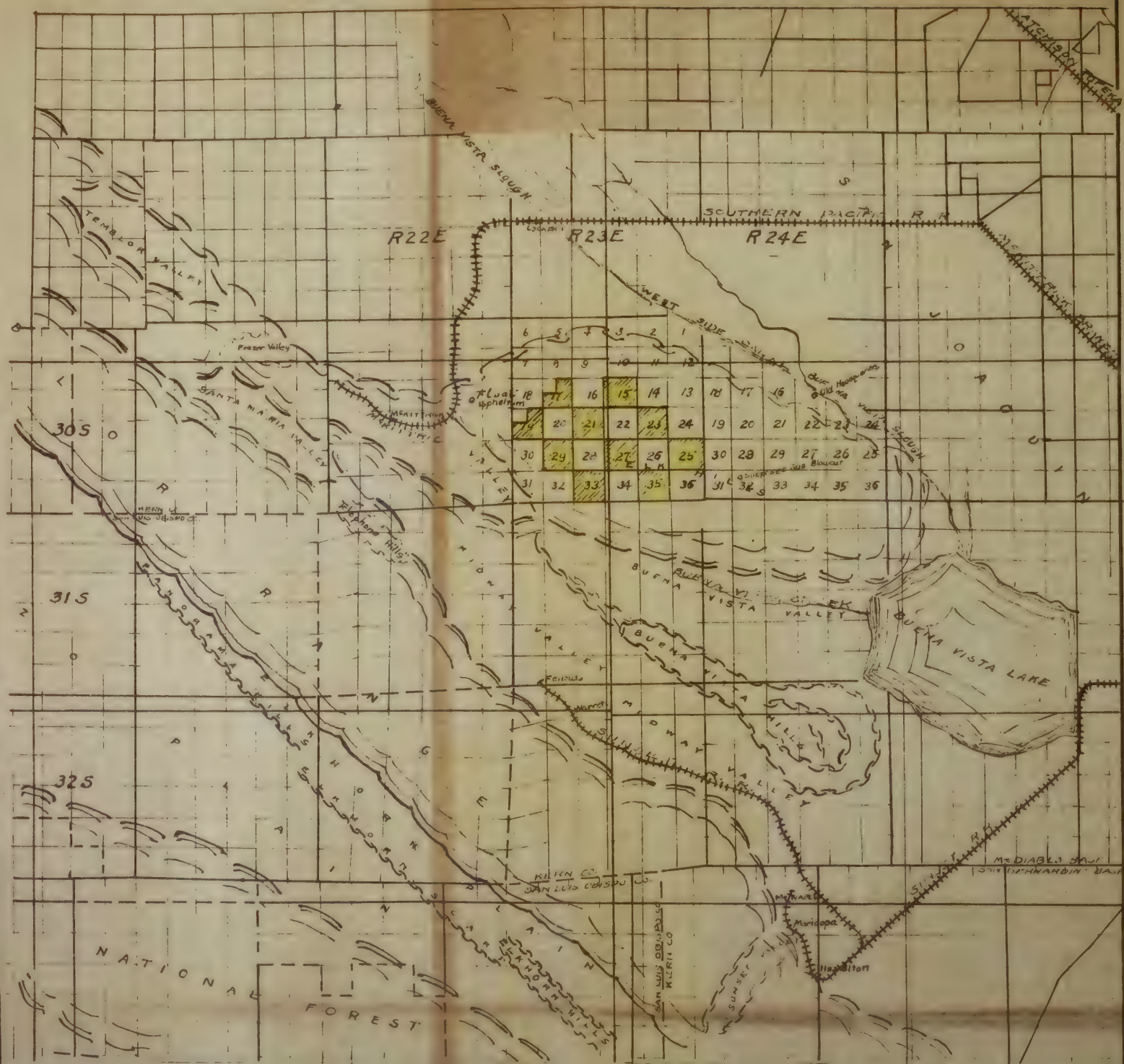


Red Apex of Anticline  
Green shows what is oil  
lands in my opinion  
from present development  
J.B. Treadwell









Lands in Suit --

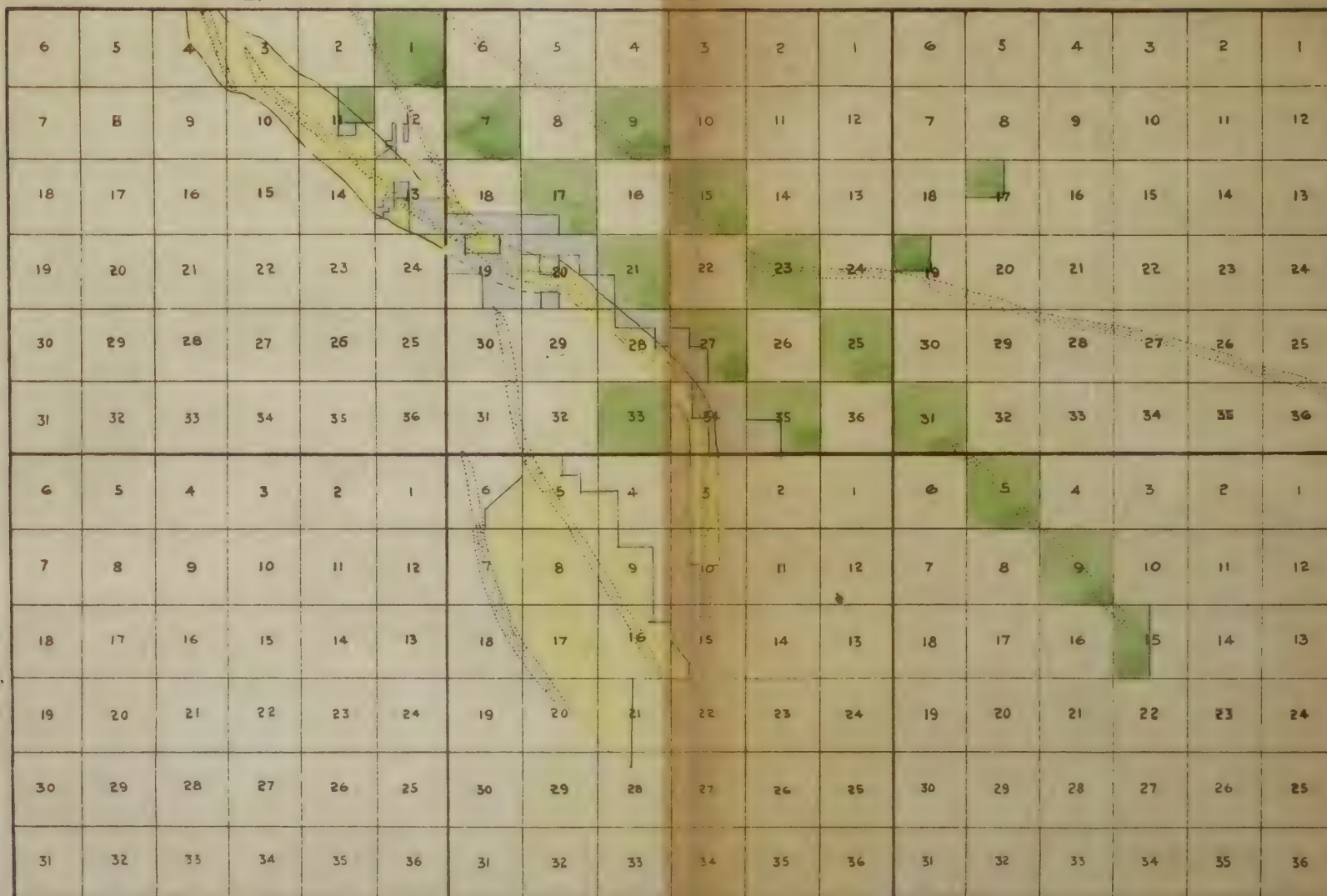




R.21E.

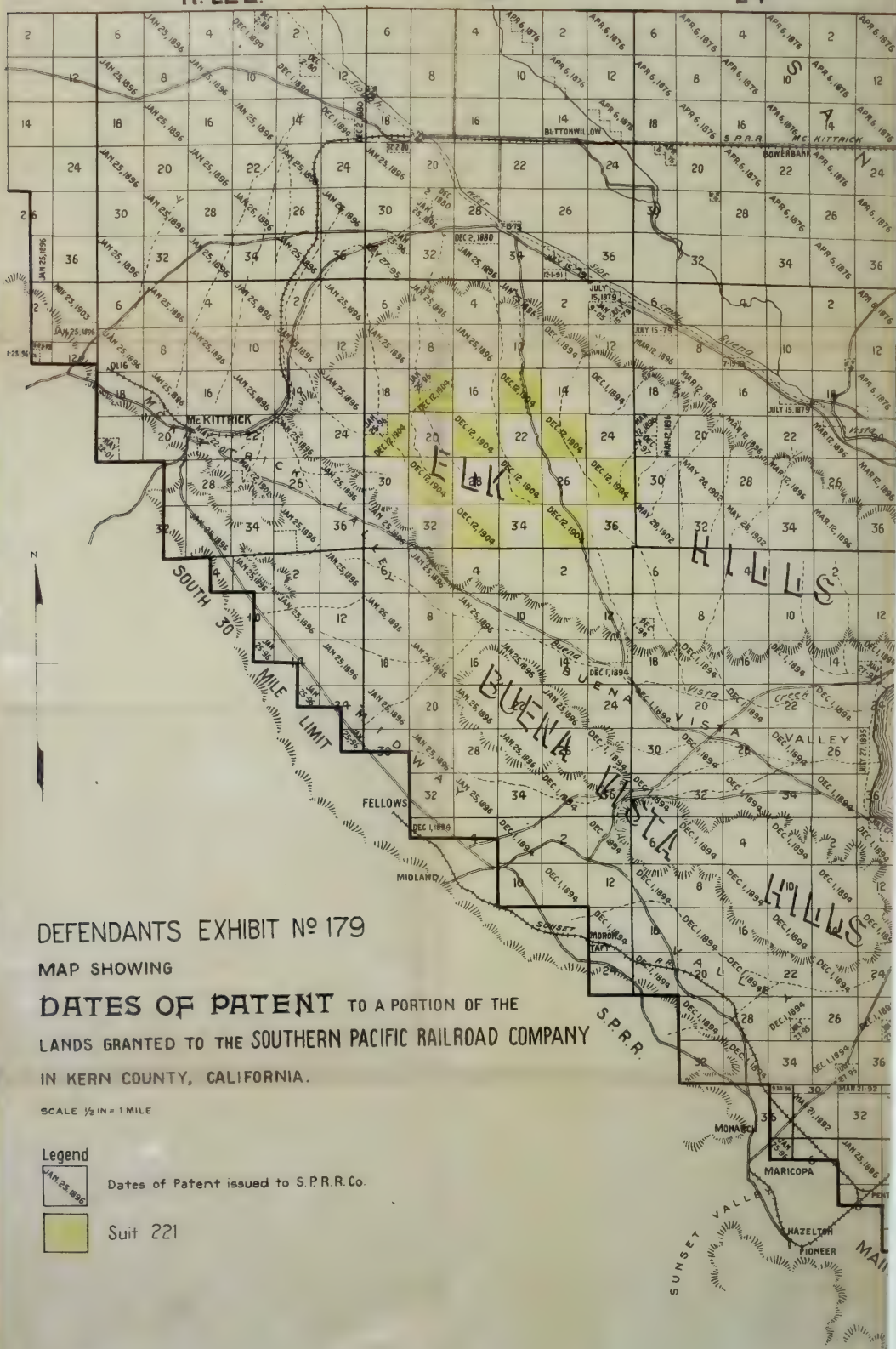
R.22E

R.23E.



Map received with Owen letter of March 25, 1903  
(Tr. page 2977)

- Apex of Anticline
- S.P.R.R. Lands should be reserved
- Lands supposed to contain oil
- Consolidated Oil Co. in which S.P.R.R. owns  $\frac{1}{2}$  int.





25

26

R.27E.



29

30

31

T.32S.

T.12N.

11

23

22

R.21W.



Plat showing a portion of  
**PLAINTIFFS EXHIBIT O**

LEGEND

OIL SEEPAGES

GAS

SYMBOLS

• WELLS WHICH HAVE PRODUCED OR ARE PRODUCING OIL OR GAS

.. INCOMPLETE (DRILLING OR D.C.)

— ANTICLINE

- - - ANTICLINE DOUBTFUL

— ORIGINAL GOVERNMENT CORNERS FOUND

— DIPS AND AMOUNTS

— LAND INVOLVED IN EQUITY SUIT 221

— DEPTH OF WELLS AS SHOWN ON THIS PLAT NOT GIVEN BY WITNESS MARTIN BUT TAKEN FROM DEFENDANTS EXHIBIT NO 16

— DATA BROUGHT DOWN TO 1912

T29S.

T29S

T30S.

T30S.

T31S.

T32S.

R22E

R23E

R24E

McKITTRICK

FELLOWS

TAF

R.23E.

R.24E.

DEFENDANTS EXHIBIT No 16  
 PLAT  
 SHOWING DEVELOPMENT AND APPROXIMATE LOCATION OF SAME  
 IN  
**ELK HILLS AND CONTIGUOUS TERRITORY**  
 KERN COUNTY, CALIFORNIA

SCALE 40 CHS=1 IN  
 1913

See Tr Page 2257

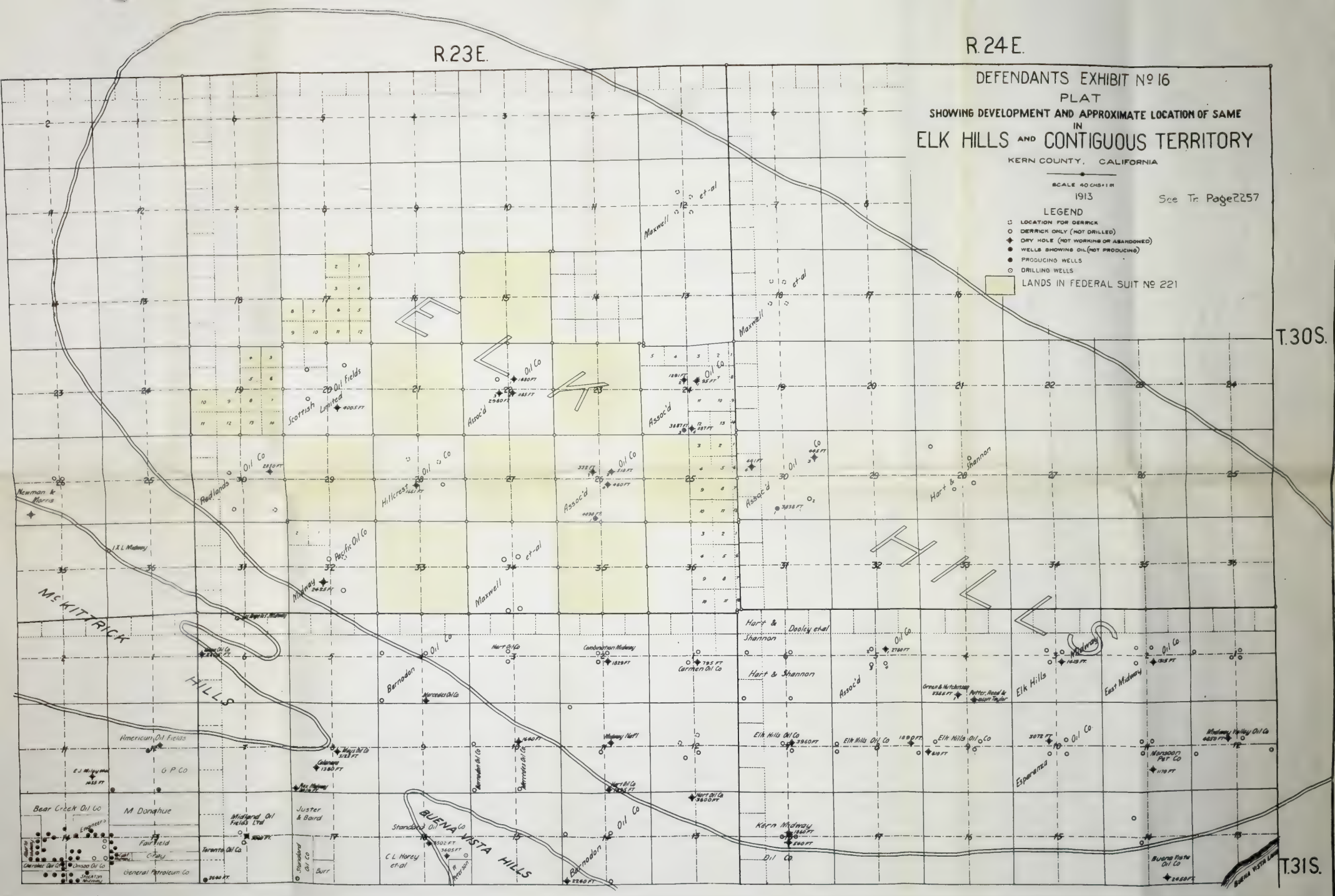
## LEGEND

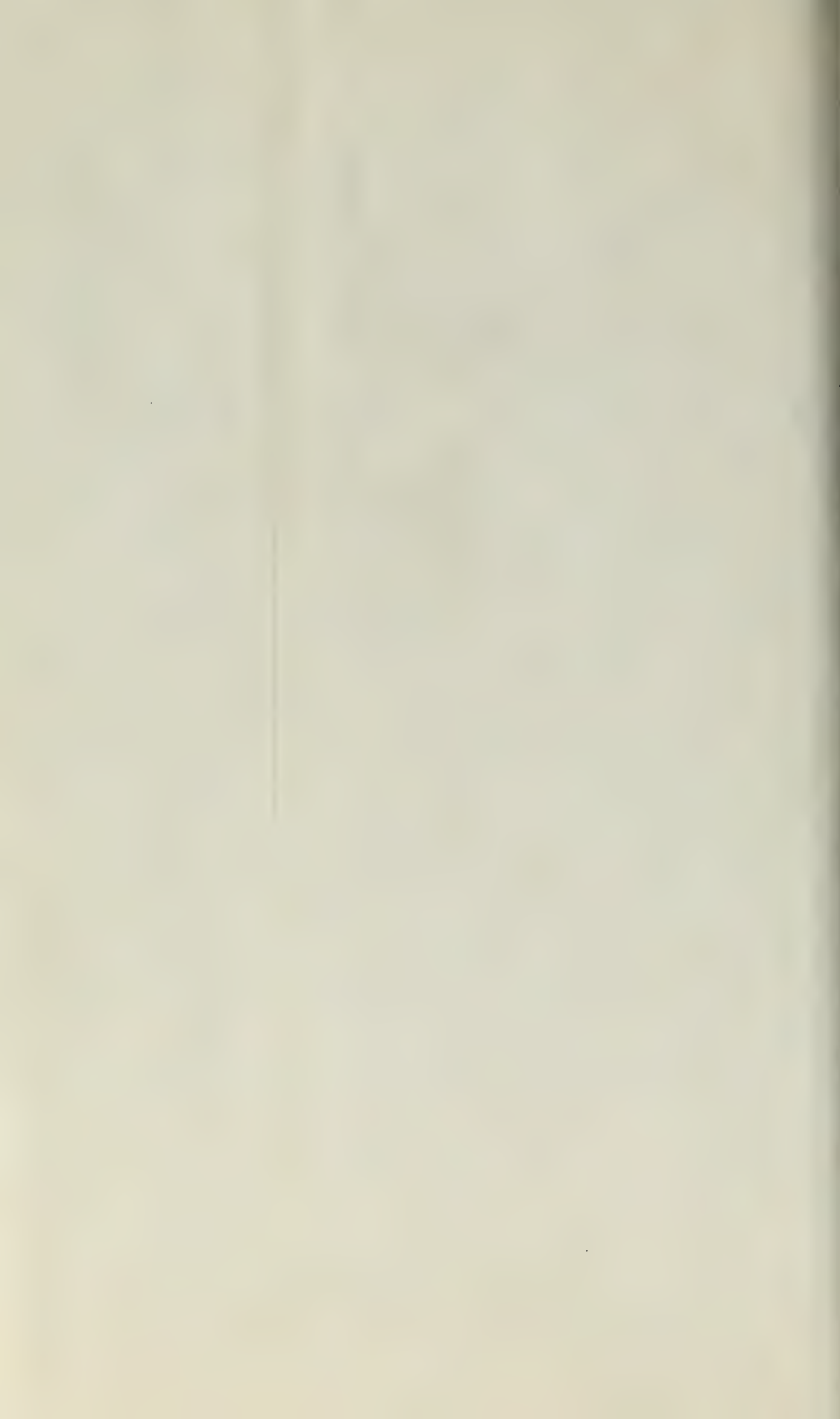
- LOCATION FOR SERVICE
- DERRICK ONLY (NOT DRILLED)
- ◆ DRY HOLE (NOT WORKING OR ABANDONED)
- WELLS SHOWING OIL (NOT PRODUCING)
- PRODUCING WELLS
- DRILLING WELLS

LANDS IN FEDERAL SUIT No 221

T.30S.

T.31S.







3

UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT

SOUTHERN PACIFIC COMPANY, et al,

Appellants.

vs.

UNITED STATES OF AMERICA,

Appellee.

IN EQUITY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED  
STATES, FOR THE SOUTHERN DISTRICT OF CALIFORNIA,  
NORTHERN DIVISION.

APPELLANTS POINTS AND AUTHORITIES

(To be accompanied by APPELLANTS BRIEF UPON THE FACTS)

Filed

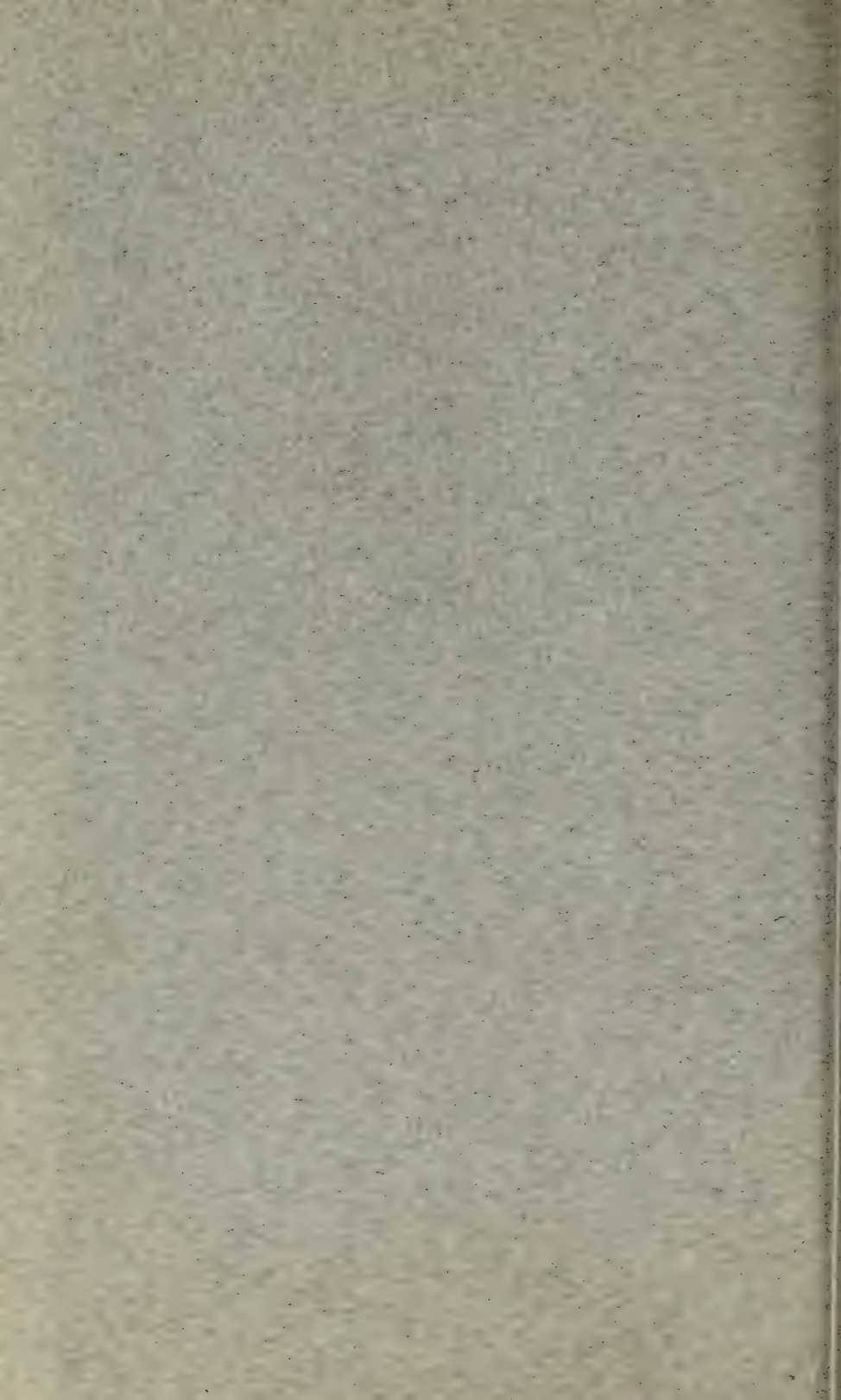
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GUY V. SHOUP,  
CHARLES R. LEWERS,

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Clerk.





# UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

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SOUTHERN PACIFIC COMPANY, et al,  
Appellants.

vs.

UNITED STATES OF AMERICA,  
Appellee.

} IN EQUITY.

---

APPEAL FROM THE DISTRICT COURT OF THE UNITED  
STATES, FOR THE SOUTHERN DISTRICT OF CALIFORNIA,  
NORTHERN DIVISION.

---

## APPELLANTS POINTS AND AUTHORITIES

(To be accompanied by APPELLANTS BRIEF UPON THE FACTS)

JOSEPH H. CALL,  
GUY V. SHOUP,  
CHARLES R. LEWERS,  
Solicitors for Appellants.

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## ASSIGNMENT OF ERRORS.

## —I—

That said United States District Court for the Southern District of California, Northern Division, erred in adjudging and determining that the United States did not prior to issuing patent for said lands on December twelve, 1904, investigate and ascertain the true character of said lands as to their being mineral or non-mineral.

## —II—

That said court erred in adjudging and determining that the United States did not on and prior to date of said patent have and possess equal knowledge with the Southern Pacific Railroad Company, and other defendants herein, and of the public generally, as to the true character of said lands, as to their being mineral or non-mineral.

## —III—

That said court erred in adjudging and determining that the Southern Pacific Railroad Company, defendant herein, or any other person, knew at or prior to the date of issuance of patent to said lands that said lands, or any of them, contained valuable mineral deposits or were known to be mineral lands.

## —IV—

That said court erred in adjudging and determining that the Southern Pacific Railroad Company, defendant herein, or any one acting by its authority,

falsely or fraudulently represented to the United States prior to issuance of said patent that said lands were not known to contain valuable mineral deposits, and that they were not known mineral lands.

—V—

That said court erred in adjudging and determining that the United States in the issuance of said patent relied upon, or had any right to rely upon, any statement, affidavit or representation of said Southern Pacific Railroad Company, or of its officers or agents, or that the United States was induced by any statement, or representation made by said company, or of its officers or agents, to issue said patent to said lands, or any of said lands.

—VI—

That said court erred in adjudging and determining that it can be ascertained and determined from geological conditions and examinations upon the surface of the ground that any tract of land contains valuable deposits of asphaltum or mineral oil.

—VII—

That said court erred in adjudging and determining that it can be established and proven from geological conditions and superficial examinations without drilling wells, that such land contains asphaltum or petroleum in quantities sufficient to make said land valuable for those deposits, or of such quality as to make such land valuable for such deposits, or

that such deposits can be found at a depth such as to make said land valuable for such deposits.

—VIII—

That said court erred in adjudging and determining that any statement, affidavit or representation made by said Southern Pacific Railroad Company, or by any one acting on its behalf, at or prior to the issuance of said patent, as to the mineral or non-mineral character of said lands, or any of them, was false or untrue.

—IX—

That said court erred in adjudging and determining that the Southern Pacific Railroad Company, or any person acting by its authority, at or prior to the date of said patent, made any statement or representation of fact to the plaintiff, as to the non-mineral character of said lands, or any of them, or did otherwise than express opinions as to the character of said lands, made in good faith and based upon a superficial examination of said lands without borings, excavation or examinations under ground.

—X—

That said court erred in adjudging and determining that said patent to said lands, dated December twelve, 1904, was not a regular and valid determination by the United States, that said lands were subject to be selected as indemnity by the Southern Pacific Railroad Company under its grant of July twenty-seventh, 1866, and that said lands were not,



by said patent, determined to be non-mineral lands, and of the character of lands that said Company was entitled to select as indemnity.

—XI—

That said court erred in adjudging and determining that the patent of the United States to said lands, or any of them, be cancelled, annulled or vacated.

WHEREFORE, said appellants jointly and severally pray that said decree may be reversed, and that said District Court be ordered to reverse said decree and dismiss the bill of complaint herein.

STATEMENT OF THE CASE.

This is an appeal by the Southern Pacific Company, Southern Pacific Railroad Company and the other defendants, from a final decree entered August 9, 1915, by the United States District Court, Southern District of California, Northern Division, cancelling and annulling a patent issued by the United States on December 12, 1904, to the Southern Pacific Railroad Company for 6109.17 acres of land in *township 30 south, range 23 east, M. D. M., California*, as lands enuring to said railroad as indemnity under the Act of Congress of July 27, 1866, and joint resolution of Congress of June 28, 1870.

The bill alleges in substance, that the defendant railroad company selected said land as non-mineral land and fraudulently concealed, from the Govern-

ment, the mineral character of said land and fraudulently represented to the Government, in its application to select and in a non-mineral affidavit accompanying it, that said lands were not mineral lands and were of the character contemplated by the said grant, that in fact said lands contained rich and valuable deposits of mineral, all of which facts were then known to said railroad company, that said statements were made for the purpose of deceiving the Government and inducing the issuance of a patent for said lands, that the Government believed said statements and acted upon them and was induced, thereby, to issue the patent in question, that the Government was induced, thereby, to omit to make any examination, investigation or inquiry as to the true facts and as to the mineral or non-mineral character of said lands. (R. 1)

The answer of the Southern Pacific Railroad Company and of the other defendants puts in issue all material allegations of the bill. The answers admit and allege: that these lands were duly and legally selected by the railroad company and were regularly and legally patented to the railroad on December 12, 1904. (R. 23, 42)

The record shows that the so-called non-mineral affidavit made on behalf of the railroad was based solely upon *information and belief* and was based upon the usual surface examination of the land without any oil wells, test holes or excavations having been made in the land, prior to this patent, either by

the Government, the railroad, or by any other person, and was merely an opinion. The undisputed testimony, in the case, shows that no oil well had ever been drilled upon any of the lands in suit, either prior to the patent or subsequent to its issuance.

It is not pretended that the railroad company or any of the defendants ever made any surreptitious or clandestine or other examination, or exploration of any of the lands in suit, by drilling wells or excavations, nor had any means for forming an opinion and belief, as to the character of the lands, that was not open to the Government as well as to the public.

In attempting to annul the Government patent to this land, on the evidence adduced, counsel for the United States demands a new and different interpretation of the laws from that which has prevailed for the past half century. From the undisputed evidence it appears that the Government does not predicate this case upon the ground that any valuable deposit of oil was *actually known* to be present in these lands, or any of them, at the time patent was issued, nor upon the ground that it was known that oil could be obtained at a depth, which in 1904, date of patent, with the then means of transportation and then values would have rendered the deposit *valuable* or *profitable to work*, nor upon the ground that a sufficient *quantity* of oil was known to exist in that land to make the working profitable, and to justify large expenditures in sinking wells. Instead of proving *then knowledge of valuable minerals*, there is an at-

tempt to substitute theories, opinion, surmises, suspicions, conjectures and speculations.

If a Government patent can be vacated upon such a showing, the United States Government has **never** issued a patent to any tract of land as non-mineral which cannot be annulled upon like character and sufficiency of evidence as that adduced in the present case.

Every tract patented by the United States, from the Atlantic to the Pacific, and from Canada to Mexico, has contained nothing but minerals. The earth is mineral; clay is mineral; sand is mineral and rock is mineral, and there probably is not a tract in that entire area in which valuable minerals may not, at some future time, be developed and exploited and made profitable with the future advancement of science, cheapened facilities of transportation and new demands of commerce. The court knows judicially that the coal and oil fields of Indiana, Illinois, Iowa, Missouri and Oklahoma were largely patented under the settlement laws and as non-mineral.

Doubtless so-called "geological experts" could be produced today who could testify that by a metaphysical operation they could transport themselves back to the time when patent was issued for any of those lands, and that they could have found geological indications of the existence of oil or other minerals, which might, at some future time, be profitably extracted.

The lands in suit are situated about six miles east



of McKittrick and McKittrick oil fields, and about ten miles northwest of Buena Vista Lake, and about fifteen miles north of the Sunset oil fields, and are in what is now known as Elk Hills. (See map plaintiff's Exhibit "O" herein accompanying "Appellant's Brief on Facts.")

Witnesses called by the Government had located or joined in the location of many miles square of land in and around the Elk Hills country, prior to 1904, without having made mineral discovery. One located in ten sections, covering 6,000 acres, and another located in seven sections or about 4,500 acres, and another joined in locating eight or ten sections, and another 24,000 acres, another 200 quarter sections, covering 32,000 acres, and another said 60 square miles were located. All these "locations" were abandoned prior to patent to the railroad.

These so-called "locators", called by the Government in this case to impeach its land patent, belong to that class of men who pretend to locate great areas for oil, covering hundreds of square miles of what they call "speculative territory", without any actual discovery of oil, hoping that someone would be found to put down an oil well and actually discover oil somewhere in paying quantities.

Much of the Government's testimony, introduced into the record (notwithstanding objections by the defendants) relates to explorations, development and drilling of oil wells, *since* the date of this patent in 1904, *on other lands*, some near to and some remotely

situated from the lands in suit, and much more to surmises, opinions and prognostications of geologists.

Of the 6109 acres of land involved in this suit, counsel for the Government has persisted in treating all of the Government subdivisions *as in bulk*, as if these numerous sections of land covering most of a township, were a single tract. There are, in fact, more than 130 Government subdivisions of 40 acres each, embraced in this suit. The prayer of the bill of complaint here is to vacate the patent *to such tracts of land as are found, by the court, to be mineral*, but the bill does not seek to and could not properly seek to annul patents to lands, which are and were non-mineral.

But the Government has not proven that any one of these 40 acre tracts was known to contain valuable mineral deposits in 1904 or since.

The Southern Pacific Railroad Company, in accordance with the regulations of the Interior Department, selected these lands as indemnity and filed with its selection list an affidavit upon *information and belief*, stating in substance that the several tracts of land were not "mineral lands". The Government made a final and physical examination of the land by its own agent, and then required the railroad company to publish its application for eight weeks in a daily paper inviting protests and then, upon a mass of evidence determined that the lands were non-mineral, and issued the patent.

Prior to the issuance of this patent in 1904, the Interior Department of the United States, from time to time, caused these lands in this district to be examined to determine and to ascertain their mineral or non-mineral character, and during that period there were numerous reports made to the Government and filed in the Interior Department, showing the extent of mineral discoveries in this vicinity and as to these lands, the last report having been made in the year 1904, just prior to the patent, that report showing that the lands, selected, were not known to contain any valuable mineral deposits.

On none of these lands has an oil well ever been drilled, or exploration made either before they were patented or since.

Of the 125 witnesses examined in this case, not one of them claims or pretends that he discovered or knew of an oil well or an oil seepage on any of these lands, either before or since they were patented, except one witness, J. A. Kaerth, testifying in an uncertain way from recollections of 11 years before when he saw the land, stated that he found what appeared to be an oil sand or deposit of asphalt on one or two tracts in suit. When this statement was made on the witness stand, defendants' counsel requested Kaerth to go to the land with a representative of defendants' and point out the place or places where he claimed to have seen these indications and this the witness agreed to do. The witness then departed from the place where the testimony was being taken

without carrying out his promise, and counsel for the Government stated in effect, that if defendants' counsel wanted this witness that his attendance should be compelled by subpoena. The testimony and statements of counsel regarding this are abstracted herein *post*.

It is a fair presumption from these acts of witness Kaerth practically admitted by Government counsel, that the witness never discovered any oil sand or asphalt as claimed, and therefore could not point out where he found them. Kaerth's flight from the trial shows that no such oil sand existed.

Two other witnesses found what they claimed to be some dry asphaltum or oil sand in or near some of these tracts, but their testimony as to location was vague. (See *post*.)

Prior to 1905 the nearest oil well to lands in suit (in Tp. 30, R. 23) was in sec. 29, Tp. 30 R 22, which is 4 miles west of them. (R. 1720).

The first actual drilling in the Elk Hills in Township 30-23 commenced in 1909. (R. 1974, 1975).

The testimony shows, that even if oil had been found on these lands in 1904 when they were patented, that the price of oil then being only 15c to 20c a barrel (R. 334) was so low that the oil could not have been extracted and marketed at any profit. There was no valuable deposit of mineral in the lands at that time even if they had contained oil. The oil had no marketable value in that location.

Seven years after these lands were patented a num-



ber of deep wells, costing approximately two million dollars, were drilled on even sections in this congressional township (30 S., 23 E) or in other townships near to the lands in suit, but all of these wells proved to be non-productive or non-paying wells, excepting one or two not in the lands in suit, and which by reason of their great depth and cost and small production have been declared, by the most intelligent witnesses, to be non-paying wells. Eight of these wells had the following depths in feet, respectively: 4850, 4030, 4000, 3500, 2500, 2400, 1900 and 1700. There were no oil rigs in the Elk Hills until 1910 (R. 2121).

It is testified and admitted by practical oil drillers and operators examined in this case, who testified upon the subject, that it cannot be determined from a superficial examination of a given tract of land where no oil wells have been drilled and no excavations made, that the land contains commercially valuable deposits of oil, and this is also established by the Government maps and scientific publications hereinafter discussed.

## POINTS OF FACT WITH ABSTRACT OF TESTIMONY.

(1) TESTIMONY ON BOTH SIDES SHOWS THAT NO OIL WELL HAS BEEN DRILLED AND NO DEVELOPMENT MADE ON ANY OF THE LANDS IN SUIT, THAT NO OIL HAS BEEN DISCOVERED ON THEM, THAT PRIOR TO PATENT IN 1904 NO OIL WELL WAS DRILLED AND NO OIL FOUND NEARER THAN

FOUR MILES FROM NEAREST OF LANDS IN SUIT, AND THAT PRESENCE OF VALUABLE OIL DEPOSITS CANNOT BE KNOWN WITHOUT DRILLING.

The following Abstract of Testimony, upon both sides, shows that no discovery of oil was ever made upon any of the lands in suit, either by so-called oil locators, or by any other person, that no oil well has ever been drilled upon any of said lands, either before or since they were patented, and no oil discovered on them, and that no geologist or oil expert can determine whether or not a given tract of land contains oil in paying quantities where the land has not been developed and where oil wells have not been drilled. That in 1904 the nearest oil well was more than 4 miles distant from them.

Government witness, F. OSKAR MARTIN, much relied upon in this case, mineral inspector connected with the General Land Office, educated in Harvard, in Saxony, in George Washington University and other places, prepared and produced in the form of a map the most important item of evidence in this case, plaintiff's Exhibit "O" above mentioned.

This map and Martin's testimony shows the extent of the oil field or land declared to be oil land by the Government geologists around the Elk Hills. It shows the location of wells and dry holes in part of McKittrick and in the Elk Hills. It shows that ninety per cent of land prognosticated to be oil land

by the Government, has been proven to be barren territory. It shows in connection with the testimony, that no well nearer than 4 miles of any of the lands in this suit was sunk until 1910. It shows that there never was an oil well on any of the lands in suit. It shows that no oil spring or oil seepage was ever found on any of the lands in suit. This map is marked plaintiff's Exhibit "O", and that part of the region around Elk Hills on a reduced scale has been reprinted and is now produced in connection with Appellant's Brief on Facts.

Martin testified in part as follows:

"I am acquainted with lands involved in this suit and have made several examinations of what is termed the Elk Hills from December 1910 until February 1912." (R. 610)

"The full red circles on the map denote wells in which discovery of oil has been made. The open red circles denote incomplete wells. \* \* \* The red hatched lines are lands involved in this suit. The red blotches mark oil or gas seepages." (R. 611)

"The map has been thoroughly checked by me in the field and I am familiar with the conditions. This map represents the condition in the field as it existed in January and February 1912. It has been checked from the field work and is correct." (R. 612)

"I do not know to my personal knowledge

that there had been any discovery of oil by drilling in the Elk Hills before my first examination (1910)" (R. 612, 613)

"The only two wells that I know of in the Elk Hills that have produced oil are the wells on 26-30-23 and 30-30-24. I do not know how much oil the well on 26-30-23 has produced. It has produced some oil. The well on 26 did not contribute very largely to my knowledge of the condition, not any more than the other wells, but as much as the well on section 30. I know from hearsay that those wells were not in existence in 1903 and 1904. I have seen the logs of those wells." (R. 618, 619)

"I would not say that the discovery of oil is in the nature of a gamble. I would call it a speculation more than a gamble. A man that speculates most usually has some reason for speculating, while gambling is just taking a chance whether the man knows anything about it or not." (R. 620)

"No one told me to place myself exactly in the position of a man in 1904 when I examined the Elk Hills, and it did not occur to me to do that. \* \* \* I was ready to consider any evidence that bore upon the character of the Elk Hills and considered anything I observed or anything I heard and thought reliable, and the conclusion I reached at that time was based upon knowledge obtained in 1910.



“Prior to going into the Elk Hills, I believe I had read Bulletin 406 by Ralph Arnold and Harry Johnson. (Government Bulletin).” (R. 621)

Martin further testified that the well called the Honolulu in the Buena Vista Hills lying five or six miles south of the Elk Hills, was sunk in 1909 or 1910. He said:

“I think the Honolulu well reached oil sand in the latter part of 1909.” (R. 646)

This Honolulu well of 1909 or 1910 strongly influenced Martin in his opinion that the Elk Hills was known oil territory in 1904? (R. 646, 647)

Martin further testified:

“On Exhibit ‘O’ I indicated in solid red circles the land on which oil discoveries had been made. There was only one in Township 30-23. That was in Section 26. \* \* \* the drilling had been started prior to the time I had been in the Elk Hills, prior to December 1910. I have been told that it was not started until after January 1905, and have no reason to doubt that.” (R. 679)

“Exhibit ‘O’ does not show any other wells in the Elk Hills where oil had been discovered.  
\* \* \*

“The other circles on Exhibit ‘O’ which are not solid red, are wells which have not, so far, produced any oil. In Section 20, 30-23, there are three wells which have not produced oil. They

are commonly termed the wells of the Scottish Oil Company.” (R. 679)

“The well on Section 30 in the same township is termed the Redlands well. I am informed that they quit drilling at twelve or nineteen hundred feet. They did not find any oil.” (R. 679, 680)

“The three wells indicated in Section 32, 30-23 as dry wells, are known as the ‘Midway Pacific.’  
\* \* \* They did not find oil as far as I know. \* \* \*

“The well indicated on Section 28 in the same township is \* \* \* seventeen or eighteen hundred feet. The log on that well does not show oil. \* \* \*

“On Section 34 in the same township four dry holes are represented on Exhibit ‘O’. \* \* \*

“In Section 22 of the same township, four dry holes are noted on Exhibit ‘O’. (R. 680, 681) \* \* \*

“In Section 26 in the same township, three dry holes and one oil well are indicated on Exhibit ‘O’. \* \* \* I think that none of them is over 2,000 feet deep. \* \* \*

“On Section 24 of the same township four dry wells are represented on Exhibit ‘O’. \* \* \* I have been informed that one of them is in the vicinity of thirty-five hundred feet deep.” \* \* \*

“In Section 30, 30-24, three dry wells are represented.” (R. 681, 682)

“I have been informed that one well in Sec-

tion 28, 31-24, is four thousand feet. No oil was found that I heard of. \* \* \* I do not think they are commercially valuable for fuller's earth. \* \* \* A great deal of what is called fuller's-earth in the Elk Hills is clay. I do not think that the gypsum deposits in the Elk Hills are commercially valuable." (R. 682, 683) \* \* \*

"The Associated Oil Company has been more active in its operations in the Elk Hills than any other company there, and has revealed the only oil that has been found in those hills, so far as I know. I have not discovered any indications of a desire on the part of that company to bury up or conceal the oil there. They furnished me information and logs." (R. 684, 685)

The Government has carried into the record in the volume of documents not printed, pages 600 to 786, an abstract of location notices in the Elk Hills region condensed at printed Record, 1652-1696. These were locations made prior to the patent in this case, by S. G. Drouillard, H. A. Blodgett, M. S. Waggy, J. I. Waggy, W. E. Youle and others. These were locations and relocations usually by the same locators over the Elk Hills country, but none of these locations were based upon an actual discovery of mineral upon the lands in suit or any of them, and they were therefore void under the Act of Congress.

No wells were drilled by any of these locators and all of the locations were abandoned.

Government witnesses, locators and oil men testified regarding these locations in part as follows:

Government witness, H. A. BLODGETT, oil driller and locator, testified:

"Associated with me in these locations were J. I. Wagy, Mr. Lamont, Mr. Jewett, Mr. Farnum, Mr. Packard. I think Mr. Youle's name was on some of these locations. I think the first of these locations were made on December 31, 1899. The locations covered a big stretch of country from the Elk Hills to the Buena Vista Hills. We kept up those locations for about six years. We spent a good deal of money on these locations." (R. 367) \* \* \*

"Q. Did you ever make any discovery on any of your claims?"

"A. Nothing more than was developed by prospecting, that is digging or excavating for roads and digging holes that would be developed for the matter of minerals like gypsum."

"Q. Did you ever make any discovery of mineral in place anywhere on your locations, to your knowledge?"

"A. Well, not to my personal knowledge, because I didn't visit the hills at that time."

"Q. You were quite generally interested in the oil business at that time, were you not?"

"A. I was." (R. 371) \* \* \*

"Q. Now, referring to those claims you were



interested in over in the Elk Hills, did you do your assessment work?"

"A. Not on all the claims. We did some considerable assessment work."

"Q. And you relocated, didn't you?"

"A. We did."

"Q. Several times?"

"A. Yes sir." (R. 387) \* \* \*

"Q. And at the time when you relocated, in each instance, you had as yet made no discovery of oil?"

"A. No."

"Q. And never did make one?"

"A. No."

"Q. And at the time when you first located, and on those subsequent times, you didn't know that there was any oil there, did you?"

"A. No."

"Q. And never did know?"

"A. No." (R. 388) \* \* \*

"Q. Then the reasons you have given are the sole reasons for not developing that property in the Elk Hills?"

"A. I consider those were reasons enough—that the oil had no value."

"Q. Did you have any oil there?"

"A. In the Elk Hills?"

"Q. To your knowledge?"

"A. You asked about the development of oil. I answer that we got no oil in the Elk Hills."

“Q. Well, was not the fact that you had found no oil in the Elk Hills, and that you didn’t know whether you ever would find any, the reason why you didn’t develop those properties?”

“A. You don’t suppose we expected to find it running out of the ground, do you? It costs money to find oil in any oil territory.” (R. 390, 391)

Government witness, M. S. WAGY, testified as follows:

“Q. How many sections did you locate?”

“A. That has been a good while ago. I don’t just remember the number. I can’t recall now, just the number of sections. We took everything that looked good.”

“Q. Did you locate any lands in 30-23 and in 30-24?”

“A. Yes sir.”

“Q. About how many sections did you locate altogether?”

“A. To the best of my recollection I was interested in eight or ten sections. I can’t be positive of that. I didn’t keep any record of it.”  
(R. 177) \* \* \*

“Q. Isn’t it a fact that the claims were relocated in 1903?”

“A. They might have been.”

“Q. Were they not relocated in 1901 or so?”

"A. I haven't any knowledge about it."

"Q. Did you and your associates do all of the necessary location work?"

"A. I didn't do any." (R. 186, 187) \* \* \*

"Q. You say that this blow-out that you have referred to was in Section 32, Township 30-24? Is that correct?"

"A. Yes sir." (R. 188) \* \* \*

"A. We commenced at 30-24, at the corner down near the Headquarters Ranch." (R. 188)  
\* \* \*

"Q. You found a blow-out in 26 of 30-23?"

"A. Yes, there was indications there." \* \* \*

"Q. Did you locate on any sections adjoining it?"

"A. No."

"Q. You found a seep of 32 of 30-24?"

"A. Yes."

"Q. Did you find one in 26?"

"A. There was a disturbance there in 26 of sand or shale broken up that we were over."

"Q. In 30-23?"

"A. Yes, but I don't have any recollection of locating that land." (R. 197, 198)

Government witness, B. K. LEE, one of the locators and relocators, said:

"I found no oil sand in any portion of Township 30 South, Range 23 East." (R. 232) \* \*

"During the time I was prospecting in that

country, I went practically over the whole country from Taft to Coalinga. At different times, when I had the time and opportunity, I would go out and prospect for information.”  
(R. 233, 234) \* \* \*

“I found that the ground in that country was covered over one, two and three deep with locations by people who owned from eight to ten sections.” \* \* \*

“The greatest activity was shown in that country in the matter of locating claims in the latter part of 1899 and the spring of 1900. During that time the country was plastered for miles. Not only those who were experienced in oil, but those who knew absolutely nothing about it, went in there and located the entire country. A number of these locations were made at the Court House at Bakersfield.” (R. 234) \* \*

I do not know any well in that township or in the Elk Hills that you would call a paying well.”  
(R. 236)

Government witness, J. I. WAGY, oft repeated locator, testified:

“Q. How many of you were associated together in these locations that you made in 1900 or 1899?”

“A. Ten or eleven of us.”

“Q. I understand you to say that you located fifty sections in all?”



"A. In the neighborhood of fifty. I believe it was a little bit more. We were not overlooking anything that we thought might be oil land."  
(R. 250) \* \* \*

"Q. Where were these shafts dug?"

"A. I can't tell you the point now or the sections where they were dug." \* \* \*

"Q. By Mr. Lewers—Do you know of any of these shafts revealing mineral?"

"A. I do not."

"Q. Never heard of it?"

"A. No sir."

"Q. So far as you know none of them revealed mineral?"

"A. Not to my knowledge." (R. 252) \* \*

"Q. You don't know of anything that was disclosed?"

"A. I do not." (R. 253) \* \* \*

"Q. Then you did nothing but post the notices?"

"A. We did some work. We kept Lamont there three or four years."

"Q. What was he doing?"

"A. We considered he was trying to hold possession of the ground." \* \* \*

"Q. Do you know of any discoveries that he made during that time?"

"A. No sir."

"Q. Of mineral of any kind?"

"A. I do not."

“Q. Don’t you know as a matter of fact that he did not discover mineral of any kind?”

“A. I do not.”

“Q. You never heard of his discovering any, did you?”

“A. Yes.”

“Q. What did he discover?”

“A. Well, he told me that he had discovered oil formations in different points on the lands, and he had marked out on this map that I speak of where they were.”

“Q. Did he discover any oil?”

“A. No.” (R. 254, 255)

E. J. MILEY, experienced oil driller, witness for defendants, testified:

“I drilled a well on section 29, 30-22, the location where I first did my operations in 1900. There I drilled a well 3,520 feet deep, which we abandoned. \* \* \* We didn’t get a producing well.” (R. 1712) \* \* \*

“Q. What was the opinion of oil men at that time, if you know, prior to 1905, with reference to the Elk Hills being oil territory or not?”

“A. Why, it was never looked on as being classed worth spending money on in the development for oil at that time.” (R. 1715) \* \* \*

“Q. At the present time, Mr. Miley (1912), is there any oil being produced from any portion of Township 30-23, to your knowledge?”

“A. No. None being produced now.”

“Q. And where is the nearest point to that from which oil is now being produced?”

“A. Well, to the nearest point would be section 19, 31-23 and section 13, 31-22.”

“Q. And when were those wells sunk, if you know?”

“A. In Section 19, 31-23, the first producer was brought in. I think they actually got to producing in 1910. They were in oil there, they knew they had oil in 1909, but I don't think they got the production out of it until 1910.”

“Q. Was there any oil being produced there prior to 1905?”

“A. No.”

“Q. Now, prior to January 1st, 1905, as nearly as you can fix it from your knowledge of the country, where was the nearest place where oil was being produced with reference to the Township 30-23?”

“A. The McKittrick, in Section 29, 30-22.”  
(R. 1729)

Government witness, H. P. DOVER, oil locator and operator, testified:

“I first went into the Elk Hills in 1903 or '04 for the purpose of locating oil lands.” (R. 463)

“I judge it was sometime in May, or maybe later in 1903, when we made those locations.”  
(R. 463) \* \*

“From 1903 to 1909 nothing whatever was done in the way of development work on those claims by me or my associates. I made no discovery of oil in 1903, or after that. They claim that they have got an oil well on Section 30 now. In 1903 or 1904, I did not know of any oil in the Elk Hills. I never saw any oil there, or other mineral; nothing but this blow-out (in 30-24) and we located the territory because of it.” (R. 466)

Government witness, N. C. FARNUM, oil locator, testified:

“On the strength of the report I have mentioned as coming from Mr. Youle and on my own personal observations, we made locations in the Elk Hills. We located all of the land in T. 30-23, 30-24, 31-23, 31-24, that was not patented at that time. (R. 501) \* \* \* We kept up the locations we made until 1906. (R. 502) \* \* \* At that time (1904) it had no value as actual oil territory.” (R. 510) \* \* \* We located all the land we had in four townships. At least 42 sections. We didn’t make a discovery of oil on any of them. We didn’t know that any of them actually contained oil and we made all locations for the purpose of prospecting and developing that country for oil.” (R. 514)

“I went over 30-23 very thoroughly and have no recollection of finding any oil seep in that



township. \* \* \* I have no recollection of asphaltum reefs in 30-23. I have seen sandstone, what is usually termed a cap rock, that was discolored. Whether this discoloration occurred from oil that had been in it or not I never made an investigation. I saw that cap rock I think in 27 and 33 according to my recollection of it now in the south portion of Township 30-23." (R. 516) \* \* \*

"I think we were the first to go over into the Elk Hills to locate except the men we bought out; we saw no evidence of anybody else being in there. That was in 1899." (R. 517)

Government witness, W. E. YOULE, one of the oldest and most experienced experts and operators, testified:

"The biggest wells in the world are where there is the least asphalt." (R. 553) \* \* \* In California, the existence of oil sands is always a good indication of finding oil in paying quantities." (R. 556) \* \* \*

"No man could tell until developed as to the existence of oil in any quantity." (R. 557)

"Geologists, scientific geologists—Le Conte—taught in some school that there was no oil in California, and gave a good reason for it. I know that you can get all the advice you want from geologists and from Bulletins that this is so and that is so, but you cannot prove it until you put

the drill on, and the drill has shown exactly what practical geology is. The drill has shown that it is very unsafe to say that there is not anything over there in those hills today at a reasonable depth."

"As a result of my long experience and operations and practical work in the field, I have not come to the conclusion that the opinions and theories of scientific geologists are entirely reliable. I have come to this conclusion that a lot of Bulletins that were written in those days, without the history of drilling that has happened since then, have proven that the geology of that date was not the geology of today. Geologists in those days, like Le Conte, made predictions that were not true; but geologists since then have found out their mistake and don't do it. I say, a geologist will say all those hills towards the Elk Hills and that whole country "There is good oil territory," but as to the depth, I don't see how they can tell. They endeavor to tell, but the drill is the proof of it. As a practical geologist, I would say that scientific conjectures with reference to the depth of formation have to give way to the actual test of the drill." (R. 564, 565)

ROBERT E. GRAHAM, practical oil driller and operator, testified:

"I didn't make locations in the Elk Hills because the country didn't look very good. It

looked pretty good from a structural standpoint, but I didn't find any oil seepage throughout the cropping of sand." (R. 2136)

"I never saw an oil seepage anywhere in the Elk Hills. I have seen what was called an oil seepage; it was not at all similar to the one in Township 11-20, in the Midway." (R. 2138) \*

Government witness, COLON F. WHITTIER, testified:

"I don't know positively of any oil seeps in the Elk Hills." (R. 470) \* \* \*

"All prospective oil land is not paying oil land and one cannot determine that without actually drilling wells." (R. 477)

Defendants' witness, SAMUEL SHANNON, testified:

"The opinion of my associates and acquaintances is unfavorable as to whether or not the Elk Hills are regarded as oil territory. I certainly would not advise anyone to invest any money in the Elk Hills at the present time in the hope of finding oil." (R. 2141) \* \* \*

"I did not see any wells in the Elk Hills in 1909. I found a little oil sand in Section 32, 30-23, in the Elk Hills, which we assumed had every evidence of being an oil sand. I am not prepared to say that it was an oil sand. I visited that section and examined it myself, personally.

It had every evidence to me that it was an oil sand although it didn't have the same characteristics that you generally find in the West Side field in relation to oil sands, because it had nothing in it—it was absolutely dry.” (R. 2142, 2143) \* \* \*

Government witness, FRANK BARRET, oil land prospector, driller and producer, testified:

“I know where the Elk Hills are situated, in Kern County. I have visited them. I first went there in 1899. \* \* \* I went through the Elk Hills and came back to the south of the hills, beginning at the East end of the hills, through what is now called Elk Horn Valley, to McKittrick. (R. 479) \* \* \* I found two or three places where there had been seepages, and, of course, you could see twice as big as your hand on the side of the formation, where, perhaps all of the lighter properties had evaporated and you could see it there and scrape it off with your knife. It was not asphaltum; it was oil. Then I took some of the outcroppings home with me, and from the smell you could get just a little odor of oil, but when I crushed it at home and applied the chloroform test to it, I got traces of oil out of it. I wouldn't be positive that it was in Section 17, but I think it was, where I found the seepage. One of the Miller & Lux's men was with me to pilot me. He told me, I think, it



was in 17. It was in Township 30-24, near Section 23. (R. 479, 480) \* \* \* At the time I was in there, I didn't know of any oil deposit underneath any portion of the Elk Hills. I only knew from surface indications and I believed they were there, but I didn't know they were there. I believed the country might produce oil, and I was examining it with reference to its character as an oil prospect. I knew of no discovery of oil in the township and heard of none. I could not have said "this is known oil territory." \* \* \* "I have observed promising indications very frequently that didn't pan out. The oil business is a good deal like elections.\* \* \* In one section on a well down 3200 feet and no oil; the next section to it, 250 feet, and good producer. A high-priced expert couldn't see a bit deeper into the ground than another. The oil doesn't always appear where they say it will. The true expert is the drill. You couldn't say that a territory is known oil ground till you put a drill in it. It is not known till it is proven." (R. 485)

Government witness, A. C. VEATCH, geologist and formerly chairman of Land Classification Board, United States Geological Survey, testified:

"I have stated repeatedly that I would not guarantee to any man going into the Elk Hills

that he would get commercial wells." (R. 883) \* \* \*

"Q. In your opinion then—I am now asking for your belief—there is a large quantity of oil under the Elk Hills?"

"A. I believe so."

"Q. And at what depth?"

"A. I should say it may be under five thousand feet or it may be over."

"Q. In 1904 could that have been mined at a profit?"

"A. No." (R. 885, 886) \* \* \*

"Q. You say "ultimately developed." Will you hazard a prediction as to when that would be?"

"A. No."

"Q. Will it be within the next ten years?"

"A. It is possible."

"Q. And it is possible that it may not be for twenty years?"

"A. It is possible."

"Q. Or a hundred years?"

"A. I think that is very remote." (R. 887) \* \* \*

"Q. Mr. Veatch, in your opinion can the existence of oil be determined without drilling?"

"A. It cannot be proven in commercial quantities without drilling." (R. 902)

The Government, not relying upon its own former reports as to these lands, nor upon the affidavit of the

railroad based on information and belief, that the lands were non-mineral, ordered its own special agent, Mr. Ryan, to investigate the character of the lands, after the railroad applied to select them, and in his report of January 22, 1904, Ryan states:

"Found no oil seepage, oil springs, surface, or other indications of oil or minerals of any kind that would tend, in my opinion to warrant said lands being classed as mineral in character."  
(R. 1550, 1551)

That the existence of valuable oil deposits in unimproved and undeveloped land cannot be proven by geological opinions, has been well established in this case by the Government.

Plaintiff's Exhibit "O." above mentioned. pre-

**EXPLANATION:-** The reduced plat of Plaintiff's Exhibit "O" in a separate envelope accompanying this brief contains territory in the McKittrick and Midway Oil Fields, not shown on the above mentioned plat which accompanied appellant's condensed statement, not reprinted; so that the above calculation of the number of "drilled wells," "producing wells" and "dry holes" having been based on said smaller map is incorrect as to such wells upon exhibit "O" accompanying this brief.

The calculated number of wells and areas upon exhibit "O" accompanying this brief is as follows:

Total number of wells drilled - - - - -	77.
Total number which have produced oil or gas - - -	40.
Total number of dry holes - - - - -	37.
Total supposed oil field in acres - - - - -	116,00
Actual area of oil land proven by drill	
at five acres per well, acres - - - - -	2,02

ducing oil or gas, and all other wells, not producing, marked as idle or incomplete, are indicated by round circles. This reduced plat shows upon the 116,480 acres a total of 357 drilled or drilling holes of which 147 have produced or are producing oil, or gas, and 210 have not produced or are not producing oil. All but three of the 147 marked as "producing oil" are in the Midway Field southwest of Elk Hills. The area of productive or proven territory covers about 4000 acres or  $1/29$  of the whole field indicated.

Plat "O" further shows that, in the McKittrick field at the northwest corner of the plat, there are nine wells to forty acres, or about  $4\frac{1}{2}$  acres to the well.

In the whole "oil territory" on Exhibit "O," there ought to be over 25,000 producing wells, but in fact there are only 147 oil wells and 210 dry holes. According to this exhibit and testimony, of geologists, if Martin made 29 predictions as to where oil would be found, he would not be right more than once.

Government witness, JOHN CASPER BRANNER, professor of geology at Stanford University and an eminent geologist, testified:

"In passing upon the character of the Elk Hills, I did not determine in any way the quantity of oil and made no attempt to do so. I could not have done so from the examination I made. That could only be determined by putting down wells. One well might determine the matter and



it might not. Development is required to determine whether or not that is a valuable oil deposit.” \* \* \*

“A geologist does not determine the economic value of the land for oil. All he undertakes to do is to say whether or not the land has prospective value. \* \* \* I could not, when I first examined the land, have given an assurance that oil in valuable quantities could have been found.” (R. 1007, 1008)

Defendants’ witness, FRANK M. ANDERSON, oil geologist, graduate of University of Oregon and of Stanford University, testified:

“It obviously is impossible for any geologist to look into the ground below the surface very far. He might infer various things and come to some kind of conclusions, but he certainly cannot reach a sound conclusion that a given piece of land will be oil producing, without actually drilling it.”

“Q. By Mr. Lewers—Well, will drilling it be sufficient to determine the problem?”

“A. It will not be sufficient to determine the problem of its commercial value. Its commercial value cannot be determined by drilling alone. \* \* \* The final and ultimate test of the value of oil land is the actual production over a period sufficient to recover all costs.” (R. 2548, 2549)

“Q. Was there anything known, as far as

your knowledge was concerned, in 1903, of any gas in the Elk Hills?" \* \* \*

"A. Why, certainly not, for the wells were not drilled at that time." (R. 2721)

Defendants' witness, J. A. TAFF, geologist, formerly in the service of the United States Geological Survey, testified:

"Q. Now, Mr. Taff, that seepage in Section 32 of 30-24 to which you have referred at some length is, in your opinion, a gas seepage, I take it, from your direct testimony?"

"A. It is not."

"Q. You think it is not a gas seepage?" \*

"A. I didn't observe any seepage at all." (R. 2843, 2844)

He further stated:

"There is not any seepage or asphaltum indications anywhere in the Elk Hills that I know of." (R. 2766) \* \* \*

"A man standing at McKittrick after going over the Elk Hills if he is a geologist, would know the character of the structure of the Elk Hills. Looking at the development at that time (1904) or even at the present time, would not by any means enable him to conclude the oil or non-oil character of the Elk Hills. The fact of the case is that at the present time along the McKittrick anticline opposite the Elk Hills, all attempts at drilling have failed." (R. 2780)

FRED KIMBLE, oil operator, testified as follows:

“Have been interested in the oil business for about 12 years, first at Coalinga. \* \* \* I never heard the Elk Hills, among oil men, considered possible oil territory, prospectively speaking, until after the Honolulu well came in, (1909), and then that started a good many prospectors to thinking that the Elk Hills might be oil land, being apparently similarly situated. (R. 2116, 2117) \* \* I did not make any locations in the Elk Hills or attempt to. I am familiar with the impression amongst oil men as to the character of the Elk Hills. That impression is that it is not oil land, commercially speaking. We consider that it has been demonstrated not to be oil land by reason of the large proportion of failures, and the depth they have gone without success.” (R. 2118)

Kimble described eight wells he drilled for oil in other places which were failures excepting one, which produced for a time, fifty barrels a day. R. 2118, 2119)

He further testified:

“In spite of the dry holes, I have been ahead of the game. Of course, I have made it on land but not in drilling wells. In selecting oil lands, I have been successful; in drilling oil wells, I have been unsuccessful.” (R. 2119)

\* \* \* \* \*

“At the time I was in the Elk Hills in 1910,

the work there was just starting. There were no rigs up. ” (R. 2121)

\* \* \* \* \*

“Of course, to know what a well would amount to, we would like to see it produce maybe for thirty days, or something like that, to see how it holds up. I have known wells that started off nearly that good and were afterwards abandoned.” (R. 2121-2122)

Government witness, J. W. KAERTH, who formerly was employed in 1901 as surveyor to survey lands in Township 30-23, testified:

“I had occasion to go to every portion of the township covered by that contract made with Jas. M. Duee, in 1901. My recollection is we completed the survey near the middle of December. To the best of my recollection our camp was in Section 33 of that township, and on the south slope of the Elk Hills. I found evidences of oil and asphaltum over a good portion of that township. I found those ridges or reefs. If I were going to describe them as they appeared there, I would say that they had very much the appearance, as I remember them of an ordinary ledge of sandstone. (R. 420) \* \* \* If I were going to specify where we found the oil seepages, I would say near the south line of Section 17, and near the south line of 25. I was going to say



that whatever we found was usually close to the section lines, because we did not get off the lines very far. \* \* \* According to my recollection, the oil seep in 25 was in the NW $\frac{1}{4}$ . I remember it as being near the SE $\frac{1}{4}$  of Section 25. That oil seep was just a small spot there in the bottom of the gulch, in a depression; just a small black spot in the soil, that had the appearance of oil. \* \* \* I was last on the ground when I left that survey, and have never been back since.” (R. 421)

\* \* \* \* \*

“Q. Could you, Mr. Kaerth, spend the time to go out to the Elk Hills immediately and make an examination?”

“A. What is this? Wednesday?”

“Q. Yes.”

“A. I think so.”

“Mr. Lewers—Very well. We will be very glad to make the arrangements. That is all.”  
(R. 423, 424)

On the next day after the above examination of Jacob Kaerth and after he had promised to immediately point out the lands where he found or claimed to have found asphalt and oil sand, the following colloquy was had between counsel, in which appellants claim that Government counsel admitted that Kaerth had left the vicinity of the court, and could not be recalled without issuance and service of subpoena:

“Mr. Lewers. Before you call the next witness, I desire the record to show that after the witness Jacob Kaerth yesterday on the stand announced that he was willing to immediately go out into the Elk Hills with a representative of the defendants in this case, and after he left the stand we endeavored to make arrangements with him to go out there and point out the places where he found the ledge of asphaltum, or reefs, and oil seeps in Township 30-23, he having testified that the asphaltum reefs, as he called them, existed in numerous places in that township. That after leaving the stand, in response to our request to go out there and show our representative, he stated at first that he was willing to do so.

“Mr. Mills—I want to interpose an objection to this gossip and tittle-tattle. If counsel wants to be on the stand and sworn and give us an opportunity to cross-examine him, we are perfectly willing that he make any statement he wants to. But this idea of testifying into the record from the mere statements of counsel, we shall object to as improper and entirely hearsay.”

“Mr. Lewers—I understand the reason for the objection. After stating first that he was willing to go, he later informed us after conference with the attorneys for the Government that he declined to go.”

“Mr. McCormick—We want to put in a further objection and ask that it be considered as

made at the time Mr. Mills made the objection that Mr. Kaerth is a witness and testified where he lived, and the process of the court is open to the defendant to subpoena him."

"Mr. Lewers—All I know is he was willing to go at first and changed his mind for some reason." R. 459, 460, 461)

Government witness, IRA M. ANDERSON, testified:

"In 1899 and 1900 we went to Section 2, the section that cornered on Section 34, Section 2 being in Township 31 South, Range 22 East. I found asphalt in there and oil sand. (R. 155) \*

\* \* It is up there in the northeast corner of Section 26, Township 30 South, Range 22 East, and on Section 22 in the same township and range. I have seen deposits of asphaltum or brea north of that in this range of hills called the Elk Hills on this exhibit "I." \* \* I have gone to this deposit from the headquarters ranch and in doing so travelled southeast. I first saw this deposit in 1900, when I first came in the country.

\* \* \* When I first went into that country I knew nothing about the Elk Hills. It was always called the Buena Vista Hills by me. I never heard of the Elk Hills until the last few years." (R. 162)

B. T. DYER, field manager for the Central Petro-

leum Company and experienced oil operator, testified:

“I know of instances where men who were considered to be expert geologists have predicted the discovery of oil in different places at given depths and where the development following their advice has failed to reveal any oil although the wells had gone much deeper than originally planned.” (R. 2052, 2053)

\* \* \* \* \*

“When I first went into the Elk Hills to look after the supposed seepage I did not know that Mr. Ochsner was going with us, but we thought he would be able to give us some advice. We took a sample of the seepage. This material was black. I do not think it was an oil sand and I do not think that I have ever seen an outcropping of an oil formation anywhere in the Elk Hills, although this looked like what you would call a seepage from an oil sand. Mr. Ochsner reported that this material had nothing to do with oil.” (R. 2054, 2055) \* \* \*

“I do not think that the lands involved in this suit can be called oil land because I do not believe that oil can be obtained within a practicable working depth.” (R. 2056)

FRED H. HALL, experienced oil driller and operator, testified:

“The only way to absolutely determine the



presence of petroleum is by drilling a well, but attention should be paid to geological formations and physical evidence on the surface of the ground in determining where to begin drilling." (R. 1825, 1826)

Government witness, CHARLES BRISCO, oil explorer and locator, testified:

"Mr. Owen did not tell me that he knew there was oil at the place where I had my location or that he knew there was oil in that part of the Elk Hills. I have seen brea deposits that didn't show by future development the existence of oil but in my experience, wherever you find brea it is an indication that there is an oil belt there or near there somewhere and it has been oozed out there by the gas. It may be a mile or it may be a half mile or it may be right there and it may come straight up. That is my experience in brea. I have known wells to be sunk near those deposits and off to the side to some distance and yield no productive well." (R. 341) \* \* \*

"Mr. Owen on that trip took dips and samples and so on. That was his business. He told me he thought the territory was very deep and I had no reason to doubt his statement and that was the impression of everyone. I don't know of any person at that time that actually knew of the existence of oil in the Elk Hills." (R. 342)

Government witness, I. N. CHAPMAN, formerly government surveyor and experienced as an examiner of mineral lands, testified:

“I surveyed the east boundary of Township 30 South, Range 23 East. \* \* \* This work was done about 1893. \* \* \* It is all the right formation to find oil. (R. 315) \* \* \* When I went down and made the survey on the east line of the township it impressed me as ground that probably might contain oil. \* \* \* It is a kind of gamble when you look for mineral anywhere because you have to find it. From such indications as I saw there a man would not be justified in denying that there was oil there because a man would not bore where the surface indications were not there. He would be governed by surface indications. I couldn’t say that a man would be justified in saying that from what he observed as to surface indications that the land contained oil in paying quantities.” (R. 316, 317)

C. A. BARLOW, experienced oil operator, testified:

“I would rather take a practical operator’s opinion of an oil territory than that of any geologist I ever saw. \* \* \* I have good reason for saying this because I know that the Kern River field was turned down by every geologist who examined it and yet a wonderful oil field was

developed there. The locators who hired geologists during the excitement at Kern River were all advised by these geologists to go northeast from the discovery up toward the river. They got no oil there at all and the other fellows who went out into the field and took what was left to the northwest got the Kern River field."

"Our withdrawal from the Elk Hills was not due to financial difficulties." (R. 2009)

\* \* \* \* \*

"If he is operating on unproven territory, any man is a fool to pretend that it is below there for a certainty. \* \* \*

"No man in drilling an oil well can say to a certainty that oil exists at a certain point, because right in the heart of proven territory, with wells all around, I have drilled absolutely dry holes away below the depth at which the oil had been found." (R. 2015)

JOHN A. POLLARD, experienced well driller, testified as to the first discovery of oil in the Buena Vista Hills country in what was called the "Honolulu" in Township 32, Range 24, south of and about six miles from the nearest of the lands in suit:

"This discovery was made on February 2, 1910."

"The immediate result of this discovery was a considerable commotion in that section of the

country and to the north and west particularly.”  
(R. 1994)

Government witness, SAMUEL P. WIBLE, banker and oil land owner, testified:

“I know what is called the Elk Hills just east of McKittrick. I first saw those hills in the fall of 1893. (R. 318) \* \* \* I heard that there was a seepage there but I didn’t know just where it was but I saw it afterwards. It was on Section 32, Township 30 South, Range 24 East. It is not what you call an oil seepage; it is what you call a brea bed. Evidently oil or gas had been in it at one time and dried out at the present time.” (R. 318, 319) \* \* \*

\* \* \* \* \*

“As a man of experience in the oil fields I would not make a location of land which had no indication of mineral value on the ground at that time. The mere fact of a location is no criterion as to the mineral value. In 1900 and 1901 locations were made on lands that subsequently developed to have nothing in them whatever.”  
(R. 327)

“You cannot determine whether particular territory contains oil until you develop it. The indications on the surface, such as gas, blow-outs, brea or oil sands, do not always show that there is a producing bed below that. The presence of



brea, or oil sand or gas or blow-outs is only an indication. I have had some experience in lode mining and frequently promising indications do not pan out at all and that is true in the oil business. Mr. Owen said he believed the Elk Hills might contain oil. He said the oil measures lay under them and he thought that they were probably so deep they couldn't be reached and made to pay." (R. 327, 328)

(2) TESTIMONY IN THIS CASE SHOWS THAT EXPERIENCED OIL MEN AND DRILLERS DID NOT GENERALLY ENTERTAIN EVEN THE OPINION THAT THE ELK HILLS DISTRICT CONTAINED VALUABLE DEPOSITS OF OIL OR WERE VALUABLE AS WORKABLE OIL LANDS; and SOUTHERN PACIFIC AGENTS DID NOT EVEN BELIEVE THEY WERE OIL LANDS.

The reports and maps made by J. OWEN, geologist for the Southern Pacific Company in Texas and California in 1902, before there was any contest over these lands, show that he did not classify any of the lands in suit either as oil territory or as probable oil territory. (R. 1615, 1632)

FRANK M. ANDERSON, scientific oil investigator and expert, testified and shows in detail that a well in the McKittrick District 3600 feet in depth, would cost \$60,000.00, and if it produced continuously one hundred barrels a day with the price of oil ranging as it did from fifteen to twenty cents a bar-

rel in 1904, that it would require ten years to retire the debt of \$60,000.00, and he further states that the average commercial life of an oil well is five years. (R. 2522, 2523)

He further testified:

“Q. Well, now is not that the real reason why you did not recommend the lands to be included in the revised list of the Kern Trading & Oil Company, was because you did not have sufficient knowledge to make a recommendation?”

“A. No. The real reason is that I thought they were not oil lands.” (R. 2728) \* \* \*

“I think that nothing has yet been proved commercially valuable in the Elk Hills, or valuable in any way, that would upset my original conclusion that the land was not commercially valuable for oil.” (R. 2732)

Anderson further testified:

“I didn’t state that the geologist could not determine the structure. He can determine the structure. But he cannot determine the oil contents, or if the land contains oil at all, until it is actually drilled, and the finding of oil in the Elk Hills in the positions in which it has been found is no basis for a conclusion that it will be found in any adjacent section of land.” (R. 2550)

He further testified:

“Q. Don’t you know, Mr. Anderson, and aren’t you fair enough now to state, that any competent geologist, standing on the McKittrick

front there, knowing that line of seepages from Temblor down to Sunset along the eastern flank of that range, and knowing the anticlinal structure of the Elk Hills, would not know his business unless he at once believed that those lands were favorable for the accumulation of petroleum?" \* \* \*

"A. You are assuming that he knew those things and that these conditions existed along the flank of the Temblor Range—he knew them. Now, I presume an answer based on presumption would be sufficient. If I was in the vicinity of a populous city, on a hill surrounded by a blue fence and containing monuments or wooden and stone slabs on which were engraved the names of deceased men and women, I would think this was sufficient evidence that this place was a cemetery, without having the bones dug up and the skeletons identified. Now, the Elk Hills look to me today to be exactly in that class of things; it looks like a cemetery of disappointed hopes." (R. 2735, 2736)

Mr. Anderson further testified:

"Mr. Watts in his bulletin by the State Mining Bureau referred to quite a number of the districts that he considered prospective oil districts. \* \* \* Mr. Watts referred to such districts as Moody Gulch in the Santa Clara Valley and Purissima oil district, Half Moon Bay and Matol district, Humboldt County. \* \* \* and sev-

eral others in which there has been no development since.”

“Q. In any of the literature of that kind did you find any reference to what are now known as the Elk Hills as being oil territory?”

“A. No, I did not. I searched the literature then extant on the geology of this region, and I believe that as far as I have been able to discover (and I searched it pretty exhaustively) no reference was ever made to the Elk Hills. \* \* \* When the United States Geological Survey published Bulletin No. 4 and Bulletin No. 6 (Bulletin 406) Those contained the first reference to the Elk Hills or to that district that I have ever seen in print in any standard geological literature or any other.” (R. 2378, 2379, 2380)

Defendants’ witness, E. T. DUMBLE, consulting geologist for the Southern Pacific in Texas and in California.

Referring to an examination of lands made by himself and Mr. Treadwell in 1902. (R. 2904)

The witness states:

“The Elk Hills were not then discussed specially, unless the little anticline there on the railroad would be called “Elk Hills.” He called my attention to that anticline as a geological matter, but there was no question as to its being oil land. The oil possibilities of the Elk Hills was not mentioned, and I did not consider them myself



as oil territory. The indications at that time were, that from this sharp anticline, there was practically no chance of an extension of the oil field in that direction. The sharp anticline I have mentioned is shown on the map just in evidence. It runs through Sections 12 and 13 in 30-21, and through 10, 19, 20, 29, 27, and 34 in 30-22, and 2, in 31-22." (R. 2904, 2905)

\* \* \* \* \*

The witness further testified:

"The lands in Township 30-23 had never entered into my mind as oil land at all. The conditions around McKittrick all seem to me to preclude the possibility of oil occurring that far away from the outcrop." (R. 2928)

Referring to the statement of Thomas J. Griffin that Mr. Dumble had on a train with him passing north of Bakersfield and that Dumble pointed out to the west an alleged oil field, Mr. Dumble testified:

"I was in San Francisco until the 12th of December, 1903, when I left for Houston, where I remained until January 20, 1904, when I returned to San Francisco accompanied by my family. We came over the regular route from Houston to San Francisco, did not pass through Bakersfield or the Kern River field. I did not, during 1903 or 1904, in coming from Houston to San Francisco, pass through Bakersfield. I did pass through there on trips in 1901, and possibly in the earlier trips of 1902."

“I have met Thomas J. Griffin. He did not accompany me from Houston to San Francisco on the trip of January 20, 1904.” (R. 2928) \*

“I never had a conversation with Thomas J. Griffin respecting any of the lands in Kern County and particularly the lands on the west side, near McKittrick, in the spring of 1904, at the Rio Bravo property at Sour Lake in Texas, about twenty miles northwest of Beaumont, or at any other time or place. If Mr. Griffin testified that a conversation came up over the Rio Bravo well No. 107, and that we were at that well discussing the depth of the first strata of oil that was struck where there was a gusher, and as to the probability of striking a lower strata, and the gravity of that oil that we might strike at the lower strata, and that I began to tell him about the low gravity of oil in Kern County, of the Kern field, and Sunset and McKittrick, and that I would like to find an oil of that low gravity as it would be much better for fuel, and not so much danger of fire, and would like very much to find it, or suggested that if well 107 quit flowing or quit producing that I was going to take it up with New York and get an appropriation from there to deepen that well and go down and make a test of it, it is not true. \* \* \* there was no conversation in which I said, ‘We own a great deal of that land, a great deal of it we have not yet

taken patents on, but we expect to.' ” (R. 2968, 2969) \* \* \*

“Q. Did you ever have any conversation with Thomas J. Griffin on a train in California?”

“A. I never did. I never made such a statement to any one. I was never in the Elk Hills or on the lands in 30-23, that is in controversy in this suit. Up to the time that the patents were issued there had never been a report made to me either by Mr. Treadwell, Mr. Owen or Mr. Anderson.” (R. 2971)

Referring to the proposition to lease some of these lands to the Kern Trading & Oil Company, Mr. Dumble said:

“I did not have a remote suspicion at that time that those lands were believed to be mineral. I had no reports that these lands were mineral and I was not trying to jam that patent through.” (R. 2988) \* \* \*

“Personally, I had nothing to do with the selection. My idea of them as oil lands was that they were of no value whatever, and that they had no value except as agricultural lands. Mr. Owen’s examination of them was a very brief reconnaissance, but our idea from the beginning was that they were not oil territory.” (R.3014)

JOHN P. KERR, experienced oil operator, testified:

“Have been engaged in the oil business for about 15 years. \* \* \* In recent years I have

had charge of the Land Department of the Chanslor-Canfield Company. It is my duty to report on all territories and to go to and buy, lease and operate prospective oil lands." (R. 2122, 2123) \* \* \*

"I went over to the Elk Hills. I have been there a number of times since 1901 and have been over pretty nearly all of it for the purpose of examining the lands to see whether I thought we wanted any of them or not for oil purposes. In 1901, I stayed out there about 7 months, on the slopes of the hills on the Midway side; and then I was over all the land and went from there across into the Elk Hills and through there; I didn't see anything that I thought we wanted to spend money on. (R. 2123) \* \* \* I came to the conclusion that the Elk Hills country was too much of a 'wild cat' for us to tackle." (R. 2124) \* \* \*

"I never thought it was oil territory. I believe it was too expensive to operate if it was oil territory. I thought it would be too deep. I did not think it was oil territory and I now think it is very doubtful as to whether it is or not." (R. 2125) \* \* \*

'I would not consider a well four thousand feet deep that yielded 406 barrels for a couple of days and then dropped down to 20 barrels a day, a profitable well. A well ought to be tested between thirty and sixty days to determine whether



it is a commercial proposition or not.” (R. 2129)

Government witness, LUDOLPH G. SARNOW, oil driller and operator, testified:

“I don’t remember of any competent geologist who recommended the Elk Hills as a place that would be worth prospecting for oil.” (R. 141) \*

“The general impression was that with the appliances then existing anything beyond 1200 to 1400 feet was looked upon as economically impracticable. A 4,000 foot well would have cost a fortune in casing alone at that time and would have been regarded as prohibitive.” (R. 144)

ROBERT E. GRAHAM, practical oil operator and driller, testified:

“I didn’t make locations in the Elk Hills because the country didn’t look very good. It looked pretty good from a structural standpoint, but I didn’t find any oil seepages throughout the cropping of sand.” (R. 2136) \* \* \*

“I never saw an oil seepage anywhere in the Elk Hills. I have seen what was called an oil seepage there; it was not at all similar to the one in Township 11-20 in the Midway.” (R. 2138)

U. S. WAUGH, oil operator, testified:

“I know the Hills called Elk Hills very well, and so far as my conversation with oil men is concerned, it was generally considered that it

was very doubtful whether the Elk Hills were oil lands; in fact they didn't consider it as an oil field at all, or that there was a possibility of getting oil there." (R. 2146, 2147)

CHARLES A. HIVELY, an experienced oil man, testified:

"During the time I was in McKittrick, from 1900 to 1905, my recollection of the Elk Hills property was that it was of no value." (R. 2161)

Defendants' witness, FRED H. HALL, testified:

"I am engaged in the oil business." (R. 1822)

"I am familiar with the Elk Hills and believe that I was in them first in 1901 for the purpose of looking around, as we were then hunting for oil land to locate. We did not make any locations in the Elk Hills at that time, however. From 1900 up to 1905, I was familiar with the general impression of practical oil men in that field as to the limits of oil territory. The general opinion at that time was that the oil bearing territory was confined to the small strip from McKittrick west or northwest and a small territory around Maricopa and around Twenty-five Hill. I think they considered the oil bearing territory as extremely limited. The general belief was that the territory between McKittrick and Twenty-five Hill was not oil land.

"During this same time it was generally con-

ceded that the Elk Hills were not oil territory. At that time I would not have invested any money in a well in the Elk Hills and would have thought that a man who went in there to start a well at that time was either more reckless or had more nerve than I had.

“I think that development in the Elk Hills commenced about three years ago. \* \* \*

“I do not consider the Elk Hills to be oil land today.” (R. 1824, 1825)

JOHN A. POLLARD, experienced well driller, testified:

“As a result of my experience in the oil business and upon my knowledge of the Elk Hills country and the Buena Vista Hills and the surrounding country and my observation of what has taken place there, I would not advise a man who had capital to invest in the Elk Hills with the hope of finding oil in paying quantities. Oil men generally disregard the Elk Hills and think that it is not oil bearing territory.

“I am familiar with the general opinion concerning the Elk Hills and I have confidence in the men who drilled wells there and from my own knowledge I would not want to invest any of my own money in that locality.” (R. 1995, 1996)

Defendants' witness, D. S. EWING, oil operator and owner, testified:

“I made no geological examination in the Elk Hills. I am not a geologist. I was looking for outcroppings of sand or other indications of oil, and found nothing that attracted my attention or fancy at that time to make me think there was oil there. I made no locations there, and didn’t think there was oil there, and I have not changed my opinion since that time.” (R. 2251) \* \* \*

“I went into the Elk Hills within a very short time after I arrived in McKittrick in 1900 or 1901. I went out as a great many others did at that time for the purpose of looking over the Elk Hills to see if it would, in my judgment, justify the making of mineral locations for petroleum.” (R. 2253)

L. E. DOAN, oil operator, testified:

“I have a general idea of the Elk Hills. I went there first, I think in 1901 or 1902, when I was operating at Sunset.” (R. 2069) \* \* \*

“I was familiar with the general impression amongst oil men in that country at that time as to where the oil was. The general belief was that it lay close to the outcrop along the Temblor Range along the west side of the valley. The general impression as to the Elk Hills at that time was that there was no oil there or if there was any it was very deep, and with the methods of drilling in vogue at that time nobody thought it



would be profitable to go out into that country at all." (R. 2071) \* \* \*

"I do not think that the Elk Hills is oil territory in the sense that it can be worked at a profit. A well 4,000 feet deep is not a profitable venture for any man unless it turns out to be a tremendously big well. By a big well I mean a gusher with an enormous depth of sand, and all that sort of thing, plenty of reserve to keep the well alive for a long time. Even the wells in the Buena Vista Hills, in the Midway, that came in at a thousand barrels a day, it is questionable in my mind whether they will ever pay." (R. 2072)

JAMES A. OGDEN, oil locator in the Elk Hills, testified:

"I was first in the Elk Hills about 1895 and have been traveling over them from time to time during the eighteen years I have been in that country. \* \* \* I had some locations at one time in the Elk Hills." (R. 1982) \* \* \*

"We did nothing with these locations. I think I put up a few dollars to pay the expenses of recording the notices but that is all.

"At the time when these locations were made, I cannot say that I considered the Elk Hills to be oil land, as I thought very little about it. I was not an oil man and the other men simply used my name and I let it go at that. None of these loca-

tors were oil men, as far as I know, but they were all greenhorns in that business.

“At that time I had not heard any oil men discuss the Elk Hills as possible oil land but there were a great many people going in and locating land there. They put up no derricks and the only work done was to dig a hole here and there or fix a crossing to allow a wagon to go over a gulch. The first actual development work in the Elk Hills began about three or four years ago. Two years ago there were a number of rigs working in there but at the present time there is not one.”  
(R. 1983)

H. H. McCLINTOCK, purchasing agent and land examiner for oil companies, including Standard Oil Company, testified:

“I am familiar with the Elk Hills as I surveyed a part of that country in 1904 and from that time until 1910.” (R. 1974) \* \* \*

“From 1904 up to 1909 the Elk Hills were not considered by oil men to be oil land. I was in touch with all the oil men in the district at that time and never heard the Elk Hills discussed as oil land prior to 1909. \* \* \*

“The first actual drilling operations in the Elk Hills in Township 30-23 commenced in 1909.”  
(R. 1974, 1975) \* \* \*

“In my opinion the Elk Hills cannot be considered as oil land at the present time. I say

this because I have personal knowledge of wells as deep as 4600 feet that are apparently barren and it does not look as if there was much chance below that depth because we do not know how to go much deeper. A well 4,000 feet deep in that territory would cost about \$60,000 without counting the cost of water and fuel lines.” (R. 1976)

Government witness, JOHN JEAN, testified:

“I lived in Bakersfield in 1900; from October 1899 to 1900. While I was living in Bakersfield, Charlie Lamont showed me some oil sands purporting to have been brought from the Elk Hills. He took me out where these oil sands were found.  
 \* \* \* I struck the oil sand. It was a black, coarse sand; dry oil. I think we struck about three feet of oil sand, three feet in depth. \* \*  
 \* I looked like dry oil, burnt sand. That was southwest from the Miller & Lux Headquarters Ranch on the canal. I don’t know what township and range it was in. That was in 1899.”  
 (R. 127, 128) \* \* \*

“Mr. Sarnow said it looked good but he thought it was deep territory and very expensive. On the strength of that discovery, I with others, made locations of the lands about there. My associates were Mr. Sarnow and Mr. Treadwell. Think we located on Section 21, near the oil seep. \* \* \* I think we located one sec-

tion. We made no other locations.” (R. 128, 129) \* \* \*

“I never did any work on my locations. \* \* \*  
\* Beginning just to the west of our locations in Section 31, Township 30 South, Range 24 (the lands in suit are 30-23) and extending over a distance of six miles to the west, I heard W. E. Youle speak of that territory.” (R. 131, 132) \*

“He said light oil runs there. I don’t know about the township and range by 30 South, 23 East, but he told me it run from hill to hill. Specifically, he said it ran from Sunset to McKittrick and from Sunset up into the Elk Hills.

\* \* \* He never told me about the Elk Hills, but just said it run from hill to hill. \* \* \*  
He did tell me if you go into the Elk Hills you will find oil anywhere north of the line between Sunset and McKittrick. I don’t remember that he told me oil had been discovered or was known to exist anywhere north of that line.” (R. 132)

Government witness, SAMUEL P. WIBLE, banker and oil land owner, testified:

“I know what is called the Elk Hills just east of McKittrick. I first saw those hills in the fall of 1893.” (R. 318) \* \* \*

“As a man of experience in the oil fields I would not make a location of land which had no indication of mineral value on the ground at



that time. The mere fact of a location is no criterion as to the mineral value. In 1900 and 1901 locations were made on lands that subsequently developed to have nothing in them whatever.”  
(R. 327) \* \* \*

“You cannot determine whether particular territory contains oil until you develop it. The indications on the surface, such as gas, blow-outs, brea or oil sands, do not always show that there is a producing bed below that. The presence of brea, or oil sand or gas or blow-outs is only an indication. I have had some experience in lode mining and frequently promising indications do not pan out at all, and that is true in the oil business. Mr. Owen said he believed the Elk Hills might contain oil. He said the oil measures lay under them and he thought that they were probably so deep they couldn’t be reached and made to pay.” (R. 327, 328)

According to this reliable Government witness, who conversed with Mr. Owen, the Southern Pacific geologist, Mr. Owen did not even entertain the opinion that the lands in suit would ever produce oil in paying quantities.

Government witness, CHARLES W. EBERLEIN:

The undisputed testimony shows that Eberlein never saw the lands in suit at any time. He had no personal knowledge whatever concerning them. His

ignorance of oil development and of the law led him to the preposterous conclusion that leasing lands in the vicinity to prospect for mineral and extract it, if found, would prevent the Railroad from securing *other lands* under its grant, near by, not known to be mineral.

Eberlein testified as follows:

“A. George A. Stone had been for years the field examiner of the Southern Pacific Railroad Land Department. He was thoroughly familiar with the land, so he told me.

“Q. He made no special trip on that occasion?

“A. Not on that occasion.

“Q. To ascertain the mineral or agricultural character of the lands?

“A. No.

“Q. Did you know anything about the lands yourself?

“A. Nothing.

“Q. Did you have any personal knowledge whatever?

“A. Absolutely none.

“Q. Had you ever seen the land?

“A. Never.” (R. 1088) \* \* \*

“Now, I ask you whether at the time you came into the land department of the Southern Pacific Railroad Company, defendant, which you stated was about August 12th, and during the same month this selection was made up, you had

any specific knowledge of these particular lands at the time that list was made?

“A. No sir. It would be impossible for me to have had.” (R. 1291) \* \* \*

“I would not have known them if I had been told. It must be remembered that I was as green about the land affairs of the Southern Pacific, almost, as it was possible to be. I had given no attention to land matters particularly. I had been engaged since I came there in organizing the land accounts bureau, getting the machinery ready and set in operation that I was sent there to do, and what you are talking about was something that had not occurred at that time.” (R. 1292)

Defendants' witness, W. H. OCHSNER, geologist, testified:

“I don't think that with a knowledge of the outcroppings of oil sand in the Elk Hills, known to exist prior to 1904, when considered in connection with the anticlinal structure of the hills and with the development along the McKittrick front and down along the line of the eastern flank of the Temblor Range, a competent geologist would, without further study, be warranted in advising an investment of money for the purpose of attempting to produce a paying oil property there. I think that an opinion which in-

volves the expenditure of money should have complete study, should be concerned with not only seepages, but all the geological data that might be gathered from a long and detailed piece of work.” (R. 2211) \* \* \*

“I have seen enormous asphaltum deposits where no oil could be found by deep wells put down in the most favorable localities in the vicinity. Seepages and asphaltum deposits cannot therefore be regarded as unquestionable evidence of the existence of petroleum in the adjoining sections.” (R. 2238)

(3) THE UNITED STATES WAS FURTHER OR BETTER INFORMED AS TO THE MINERAL OR NON-MINERAL CHARACTER OF THIS LAND, PRIOR TO THE PATENT, THAN THE SOUTHERN PACIFIC COMPANY, AND ISSUED THE PATENT UPON ITS OWN INVESTIGATIONS AND REPORTS.

The allegations of the bill that the Government was not informed as to this land, and that the railroad company falsely concealed and misrepresented its true character, and that the Government issued the patent without knowledge, are not supported by the evidence, but are shown to be untrue in fact:—

(a) For several years prior to the patent of Dec. 12, 1904, the Government made numerous reports and printed, by authority of Congress, numerous documents and bulletins concerning the oil and asphalt deposits of California, and, during that entire period, kept adrift with oil developments, new discoveries of oil territory and value of oil products.



The geological condition and extent of scientific knowledge concerning the Elk Hills district in California, has continued to be the subject of investigation and report by Government publications issued from time to time, both before and since the survey of public lands in that district.

Some of these reports are contained in bulletins issued by the United States Geological Survey, and some are contained in Congressional Documents, printed by order of Congress for the information of members and of the public generally.

The courts will take judicial notice of matters of general notoriety, such as the history of the times, and matters of scientific knowledge, and especially where published by authority of Congress.

In *United States v. Whitridge*, 197 U. S. 135, 145, 146, the Supreme Court held that it would take judicial notice to avail itself of information contained in the Herschell Report on the coinage of silver in India, and which report was printed in a publication of the Government authorized by resolution of the Senate and House. See also:

*Binns v. United States*, 194 U. S. 486, 495:

It is a general rule that the Federal courts will take judicial notice of public records, both those published and those on file in the departments, relating to the history of the times, matters of general notoriety, matters of scientific knowledge, and matters relating to political history including important acts of the executive, judicial and legislative departments.

Caha v. United States, 152 U. S. 211, 221, 222:

We therefore assume that the court may and will desire to avail itself of the following Government publications, in order to be informed as to the scientific development in the Elk Hills country, and in regard to the history of the times appertaining to that section.

(b) In the Twenty-Second Annual Report of the United States Geological Survey for the year 1900-1901, which report was issued by the Government Printing Office of the United States in the year 1901, *three years before the patent in suit issued*, there is a report by George H. Eldridge entitled "The Asphalt and Bituminous Rock Deposits of the United States." Pages 365 to 452, inclusive, of this report are devoted to a discussion of asphalt and bituminous rock deposits in the State of California. Pages 448 to 452, inclusive, contain a description of the asphalt deposits and geological structure in the McKittrick and Sunset districts in Kern County, California, reference being made in the portion of this report to statements by Mr. W. L. Watts in Bulletin No. 3 of California State Mining Bureau mentioned above. And at page 450 of the Eldridge Report just mentioned the following quotation is made from Mr. Watt's Bulletin No. 3: (1900)

"This recent discovery of veins of asphaltum appears the more important when we remember that formations of similar geologic age to those at Asphalto can be traced along the foothills on

the western side of the San Joaquin Valley, and it is hardly likely, therefore, that such veins are confined to the vicinity of Asphalto. The heavy mantle of alluvium covering the western foothills of the San Joaquin renders prospecting in the underlying formations difficult, but the rapid erosion which takes place during the rainy season will probably, from time to time, expose other veins, which it will be well to investigate."

(c) In Bulletin No. 213 of the United States Geological Survey, House of Representatives, Document No. 437, 57th Congress, 2d Session, entitled "Contributions to Economic Geology 1902," beginning at page 306, there appears an article entitled "The Petroleum Fields of California, by C. H. Eldridge." In this article on pages 306 to 310, inclusive, appear the following statements by Mr. Eldridge:

#### McKITTRICK DISTRICT. (1902)

"This district lies on the edge of the desert at the eastern base of the Coast Range, about 50 miles west of Bakersfield. The railway station is McKittrick. The Coast Range in the vicinity embraces a number of parallel ridges, the highest constituting the eastern border of the Carriso Plains. From this each succeeding ridge attains a lower altitude, until the outermost line of hills is but a gentle elevation above the general valley. The developed oil field in the region of Mc-

Kittrick lies along an interior ridge, separated from the outer ridge by a valley  $1\frac{1}{2}$  miles wide. The length of this district is about 25 miles.”

\* \* \*

“A noteworthy feature of the line of disturbance for several miles, both northwest and southeast of McKittrick, also, are the dikes of sandstone richly impregnated with bitumen. These vary in length from a few feet to a half mile or more, and in width up to 10 or 15 feet; their depth, of course, is unknown. Gash veins of high-grade asphalt also occur.”

“The productive oil wells of this district for its entire length lie within a zone less than a quarter of a mile wide, and in places less than 200 feet wide. Their depth varies from 200 to 1,500 feet, the shallower holes being in the center of the field, opposite McKittrick. The yield is from a few up to 700 barrels, the latter exceptional. In gravity the oil varies between  $11^{\circ}$  and  $17^{\circ}$ B. While the narrow, productive zone is persistent in the general directness of its trend—about N.  $60^{\circ}$ W.—it is, nevertheless, somewhat undulating, according as the axis of crumpling or faulting varies.”

(d) In the year 1901, three years before this patent, the Government had the township, where these lands are situated, surveyed, and the Government surveyors were required to note in their field notes all *mines*, salt licks and salt springs, which come to



their knowledge, and also the *quality* of the lands. (U. S. R. S. 2395, Sub. 7)

In pursuance of instructions and requirements of the law, the Government surveyors carried into their field notes of township 30 south, range 23 east, the following:

“The surface of the ground in township 30 south, range 23 east, from the southeast corner running northwesterly, shows a geological formation, with asphaltum exudations that is regarded by experts as an almost sure indication of the presence of valuable petroleum deposits.” (R. 685, 686)

These field notes of township 30-23 showing asphalt exudations were carried into the public records at Washington and have remained a part of the public records to the present time. During all of those years, the whole public was authorized to locate mining claims on these lands, enter them and develop them for their mineral deposits, including oil, and yet the American public had so little confidence of the existence of oil, in paying quantities, during those years that no oil well was put down in that township and no mineral entry was made.

(e) In accordance with its practices to secure reports as to the mineral development and discoveries through its own agents, the Government secured a report from special agent, Jay Cummings, under date of July 13, 1900, as to oil development and discoveries in numerous townships adjacent to but not

including 30-23, but including township 30 south, range 22 east, and township 31 south, range 22 east. (R. 3868) In this report, which was extremely optimistic as to future development of oil, the Cummings' report states:

“Immediately after entering upon this investigation, I was confronted with indisputable facts that warrant me in stating that the lands in question, and very much of the contiguous country, are valuable only for their mineral worth, \* \* \* and I make the prediction that this will soon be the largest oil field in the United States, if not in the world.” (R. 3868)

The Cummings' report gave to the Interior Department the most optimistic and visionary ideas of the value of this entire country for oil and on the other hand the testimony in this case shows that many millions of dollars were wasted and lost in sinking oil wells in much of the territory embraced in the Cummings' report where no oil was found and in which dry holes resulted.

(f) It seems that the Government has secured and has on file in the Interior Department other reports from special agents as to the mineral or non-mineral character of the lands in and around the Elk Hills country and in the McKittrick district, as appears from the testimony of the Government officer and geologist, Oskar Martin.

The Government was fully advised as to all the mineral discoveries affecting the lands in suit sus-

ceptible of knowledge when the patent issued as evidenced by these numerous reports, and the Railroad company did not have, or claim to have, any other.

(g) The following is the affidavit for the Railroad company as to the non-mineral character of the lands accompanying its selection:

CHARLES W. EBERLEIN, being duly sworn deposes and says that he is the Acting Land Agent of the Southern Pacific Railroad Company, that he has caused the lands selected in said Company's List No. 89 to be carefully examined by the agents and employees of said Company as to their mineral or agricultural character, and that to the best of his knowledge and belief, none of the lands returned in said list are mineral lands. *R. 3852, 3850*

The Southern Pacific Railroad Company selected these lands as indemnity and in pursuance of regulations of the Interior Department, it caused a notice to be published in a *daily newspaper* of general circulation at Bakersfield, in Kern County, where the lands are situated, *for eight weeks*, stating that application had been made to select these lands and inviting protest against these selections, and a similar notice was posted in the land office. (R. 3858, 3859) In this manner the widest publicity was given to the railroad's application for these lands, and if during the preceding years, from all the public reports and investigations, concerning these lands, any per-

son had made a discovery of oil upon them, or any of them, or desired to protest against the patenting of any of them under the railroad grant, he had a right to do so, but no protest was filed.

This was a public hearing established by the Government for the purpose of again determining the mineral or non-mineral character of these lands.

(h) In December, 1903, the Commissioner of the General Land Office, knowing that oil in paying quantities had not been found in this township during the preceding years, although asphalt seepages were indicated in that vicinity upon the public records, ordered a re-examination to be made of this land, it having been temporarily reserved from agricultural entry, as stated by the Commissioner of the General Land Office.

Mr. E. C. Ryan, special agent of the General Land Office, was directed to examine this land as to its mineral character, and to report whether the suspension from entry, placed upon the land, should not be revoked. (R. 1549-1551)

Special Agent Ryan's report follows:

DEPARTMENT OF THE INTERIOR 88085

General Land Office

Los Angeles, Cal.

January 22, 1904.

Hon. Commissioner,  
General Land Office,  
Washington, D. C.



Sir:

By your letter ("N" E.C.F.) of October 23, 1903, in case of *ex parte* Southern Pacific Railroad Company, Quasi Contests 1997 and 1998, I was directed to proceed to and examine the SE $\frac{1}{4}$  Section 23; the SW $\frac{1}{4}$  Section 25; the SW $\frac{1}{4}$  Section 27, Township 32 S., Range 25 E., M.D.M., and the SW $\frac{1}{4}$  Section 1, Township 30 S., Range 23 E., M.D.M., said tracts having been applied for by the railroad company and to submit report stating whether or not in my opinion same should be relieved from the suspension placed thereon by telegrams "P" of February 21st and 28th, 1900.

By your letter ("N" E.C.F.) of December 10, 1903, I was directed to also examine Section 15; NE $\frac{1}{4}$  and S $\frac{1}{2}$  Section 17; NE $\frac{1}{4}$  and S $\frac{1}{2}$  Section 19; Sections 21, 23, 25, 27, 29, 33 and 35; Township 30 S., Range 23 E., M.D.M., and to submit report as to whether or not in my opinion said lands should be relieved from suspension.

I have the honor to report that on January 10th, 11th, 12th, 13th and 14th, 1904, I made a careful examination of the lands in question and found no oil seepages, oil springs, surface or other indications of oil or minerals of any kind that would tend, in my opinion, to warrant said lands being classed as mineral in character, and

I respectfully recommend that they be relieved from suspension.

Very respectfully,

E. C. RYAN,

Special Agent, G. L. O.

This report covers all the land in the present suit.

Agent Ryan made his report on July 22, 1904, five months prior to this patent, stating that he had found no sufficient oil indications "in my opinion to warrant said lands being classed as mineral in character."

Thereupon the Commissioner of the General Land Office, by his letter of February 11, 1904, revoked his order of suspension and approved the report of Agent Ryan, (R. 1555, 1556), by letter as follows:

#### N. DEPARTMENT OF THE INTERIOR

General Land Office,

W.O.C.

Washington, D. C.

H.G.P.

February 11, 1904.

Address only

The Commissioner of the

General Land Office

Register and Receiver,

Visalia, California.

Sirs:

By telegram "P" of February 21 and 28, 1900, Townships 30 S., Range 23 E., and 32 S., 25 E., M.D.M., were suspended from disposition under

the agricultural land laws upon allegations that same contained deposits of mineral (oil).

I am now in receipt of a report from a Special Agent of this office who has examined the SW $\frac{1}{4}$  Sec. 1, Sec. 15, NE $\frac{1}{4}$  and S $\frac{1}{2}$  Sec. 17, NE $\frac{1}{4}$  and S $\frac{1}{2}$  Sec. 19; Sections 21, 23, 25, 27, 33, 35, Tp. 30 S., R. 23 E., SE $\frac{1}{4}$  Sec. 23, SW $\frac{1}{4}$  Sec. 25 and the SW $\frac{1}{4}$  Sec. 27, Tp. 32 S., R. 25 E., M.D.M., and who states that a careful examination thereof failed to disclose any oil seepages, oil springs, surface or other indications of oil or minerals of any kind that would tend to warrant the lands being classed as mineral. He recommends that same be relieved from suspension. The statements made in the Special Agent's report are not controverted by the records of this office and it would appear that during the period of nearly four years which has elapsed since said suspension, any persons interested in the mineral development of the lands have had ample opportunity to explore and develop the same.

In view of these facts, it appearing that no oil or mineral of any kind has been discovered upon the lands in question, it is believed that no good reason exists for the further suspension thereof. Accordingly, the lands hereinabove described are hereby relieved from suspension.

Make the proper notations upon your records.

Very respectfully,

J. H. FIMPLE,

Assistant Commissioner.

IL

By telegram of February 20, 1904, the Commissioner of the General Land Office further ordered that Section 29 in Township 30 south, range 23 east, also examined by Ryan and theretofore suspended from entry under the agricultural laws, should be restored to entry. (R. 1557, 1558)

In the report of Special Agent E. C. Ryan to the Commissioner of the General Land Office under date of March 22, 1904, Special Agent Ryan reported as to the non-mineral character of all the lands in Township 30 south, Range 23 east, M.D.M., and stated:

“Township 30 south, Range 23 east. No wells have been bored for oil, and in my opinion all the lands in this township should be relieved from further suspension.” (R. 1564)

Eberlein, railroad land agent, called by the Government, testified as to the making of Ryan's report:

“I never saw him (Ryan), never had any conversation with him. \* \* \* He was sent into the field and did make an examination and reported. My request was that the Government make such an examination as to determine which of the lands we had selected were mineral and that as to the rest we should be allowed to select.” (R. 1161) \* \* \*

“Q. \* \* \* Was the action of the particular inspector who went upon the ground in any way influenced or controlled by you?



“A. Not at all. \* \* \* I don't think anyone did.

“Q. \* \* \* Was his action directed so far as you know, or ever heard of, by anyone in connection with the railroad?

“A. No sir, not that I ever heard of.” (R. 1162)

Ryan made a fair and unbiased report to the Government and his conclusion in 1904 is supported by practically all the testimony in this case.

Instead of the Government not being informed as to the character of these lands, and instead of the facts being fraudulently concealed by the defendant, Southern Pacific, as alleged in the bill, the exact reverse is the truth. The application and statement, upon information and belief, made by the railroad that these lands were not mineral, within the meaning of the Act of Congress making the land grant, was borne out and sustained by the fact that no one wanted to enter or exploit these lands for oil during any part of the period when they remained open for mineral entry, and is sustained by the reports to the Government as to the lands not being known to be valuable for their mineral contents.

In issuing the patent, in question, to the Southern Pacific Railroad Company in 1904, the officers of the Interior Department had before them an abundance of evidence during a period of years, concerning their character, and had duly considered evidence on

both sides, as to the mineral or non-mineral character of this land.

The statement of opinion by the railroad company in making selection of the land is exactly according to the fact as ascertained and found by the Government and by the public that such was the known condition of these lands in 1904.

The long series of investigations by the Government, down to the issuance of this patent in 1904, completely and convincingly shows that the Government was not only fully informed in regard to the mineral indications and discoveries appertaining to the lands in suit, but also shows, beyond question, that the Government was acting at all times, upon its own information and upon reports from its own officers and agents after investigations upon the ground, and at no time did the Government in any way depend upon, or act upon, any affidavit of the railroad company, as to its knowledge and belief as to the mineral or non-mineral character of the land.

The allegations of the bill that the Government had no knowledge of the mineral or non-mineral character of the land, and had no means of ascertaining the facts, and that it was deceived by the fraudulent affidavits of the railroad, are one and all absolutely false, as disclosed by the testimony in this case taken by both sides.

(4) **THERE WAS NO CONSPIRACY BY THE RAILROAD TO SECURE MINERAL LANDS UNDER AGRICULTURAL PATENT.**

The agents of the railroad had no knowledge that

the lands were in fact mineral lands; the lands have been proven not to be mineral lands, the railroad agents did not even believe that the lands were mineral lands, the Government was not imposed upon by any false statement of fact and the Government possessed all the knowledge concerning these lands that any person possessed.

A mass of testimony, comprising many hundreds of pages, was taken in the District Court, much of which has been abstracted and is contained in the present record on appeal, which the Government contends proves or tends to prove that prior to the issuance of the patent in question in 1904, there was a conspiracy between the officers and agents of the Southern Pacific Railroad Company to secure patents to oil lands under the non-mineral land grant of the railroad.

It should be a sufficient answer to this claim of the plaintiff, and to the testimony upon this subject in the record, that it has not been shown that any one of the tracts of land contained in this patent was *known to contain* valuable deposits of mineral oil, prior to 1904 when the patent issued, and that it has not been shown that any such tract of land *did in fact contain* valuable deposits of mineral at that time, or since, and that it has not been shown that any of the defendants or that any of the officers or agents of the Southern Pacific Railroad Company knew that the lands, or any of them, contained valuable deposits of oil, or of other mineral prior to the date of said

patent. The bulk of the testimony consists in surmises, guesses and opinions by one person or by another, as to whether the land did or did not contain mineral oil. The whole of the testimony is speculative and matter of opinion.

Considerable of the testimony relates to correspondence by Mr. Eberlein, formerly land agent of the Southern Pacific Railroad, as to what he surmised or guessed, as to whether any of these lands contained or did not contain mineral, but as before stated, it has not been shown that Eberlein, or anyone else connected with the railroad or with the Government, knew that any of these lands contained valuable deposits of oil.

Some of this evidence relates to statements said to have been made by one Josiah Owen, who had died before this trial took place, and who was formerly a geologist employed by the Southern Pacific Railroad, but it was not shown that Owen knew or even believed that these lands were mineral. The lists of maps of the lands, which Owen guessed were mineral lands, does not contain any of the lands in suit. (R. 1615-1632)

In the court below, counsel for the Government pressed upon the court and much relied upon the testimony of Thomas J. Griffin, as showing or tending to show a conspiracy on the part of the officers and agents of the Southern Pacific, to acquire oil lands under non-mineral patents, and as showing or tending to show that certain officers or agents of the



Southern Pacific Railroad knew or believed that the lands in suit contained oil. This evidence of Griffin, so much pressed by the plaintiff, is wholly hearsay and consists of pretended conversations, which Griffin had with various prominent officials and with agents of the Southern Pacific. Griffin was an oil operator and driller in 1903 and 1904, employed by the Rio Bravo Oil Company in Texas.

Griffin claims that he was personally introduced by a Mr. Treadwell, an oil superintendent of the Southern Pacific, to Mr. E. H. Harriman, president of the Southern Pacific and Union Pacific lines, while Mr. Harriman was on a flying visit through the west.

Griffin next pretends that he had conversations in 1903 with Mr. Treadwell and that Mr. Treadwell stated that he had found oil sand and indications of oil from Sunset to Coalinga, including the Elk Hills. Treadwell flatly contradicts this statement of Griffin.

Griffin testified that he had a conversation with Mr. Dumble in the spring of 1904, in which he claims that Dumble stated, pointing to the west from a Southern Pacific Railroad train near Bakersfield:

“Griffin, right over yonder about thirty miles is the biggest oil field in the world. I know it, so does all the rest of us know it. \* \* \* We have large holdings over there \* \* \* and expect to have more.” (R. 1331)

Dumble testified that he was never with Griffin on any such trip and never had any such conversation,

and the undisputed testimony in this case shows that Dumble never saw the lands in the Elk Hills or the lands in Township 30, Range 23.

Dumble testified as follows:

“I never made such a statement to anyone. I was never in the Elk Hills or on the lands in 30-23, that is in controversy in this suit up to the time that the patents were issued. There had never been a report made to me either by Mr. Treadwell, Mr. Owen or Mr. Anderson.” (R. 2971)

The uncontradicted evidence of Dumble shows that his opinions as to lands were based solely on reports made to him by Mr. Owen, another geologist, who had never reported to him that the Elk Hills district contained any oil land. (R. 2971) Dumble never saw the lands and never had any report from anyone that they were mineral. (R. 2988) The reports and statement of Mr. Owen, a geologist formerly employed by the Southern Pacific Railroad, were thus attempted to be brought into the case, and Mr. Owen having departed hence before this trial occurred, could not be produced as a witness.

The Government proved by Samuel P. Wible that Owen said shortly before this patent was issued that he, Owen, believed the Elk Hills *might* contain oil, but that it was probably so deep it couldn't be reached and made to pay. (R. 328)

The testimony of Griffin was thoroughly impeached by the defendants. Griffin claimed he was employed

by the Rio Bravo Oil Company in Texas during the period in question, but the evidence consisting largely of expense accounts and other papers signed by himself shows that he was not and could not have been in California where he testified he was at the time of his conversation with Mr. Dumble. (R. 2742, 2743, 2968, 2969, 3495, 3534, 3535)

George W. Armstrong, president of the Texas Rolling Mill Company and of the Fort Worth Gas Company and of the Dennison Mill & Grain Company, testified:

“I am acquainted with the general reputation of Thomas J. Griffin for truth and veracity. \* \* \* A number of oil men came to me to discuss the matter with me, knowing that Griffin had left the country, and the circumstances under which he left, and they seemed surprised that I did not know the character of the man; all of them seemed to know that he was both a thief and a liar.” (R. 3495)

The Government claims that the following officers and agents of the railroad conspired to secure this patent to lands, which they knew to be mineral under the guise of a railroad grant.

(1) Eberlein, land agent of the Southern Pacific. But Eberlein never saw the lands in his life, had no actual knowledge whatever concerning them, (R. 1088) never received a report from anyone that they were oil lands, and did not believe they were oil lands.

(2) Owen, geologist for the Southern Pacific.

But the testimony shows that Owen's report as to the lands which were oil lands, and also which he considered probable oil lands, did not contain any of these lands in suit, and that Dumble informed Government witnesses that the Elk Hills lands might contain oil, but that if so the oil would be too deep to be profitable.

(3) Dumble, geologist for the Southern Pacific. But the undisputed evidence shows that Dumble never saw the lands, never reported them to be oil lands and never even suggested that they were oil lands.

Owen was dead when this suit was tried, but Dumble testified:

"I was never in the Elk Hills or on the lands in 30-23 that is in controversy in this suit, up to the time that patents were issued. There had never been a report made to me either by Mr. Treadwell, Mr. Owen or Mr. Anderson. (R. 2971) \* \* \* I did not have a remote suspicion at that time that those lands were believed to be mineral. (R. 2988). \* \* \* Mr. Owen's examination of them was a very brief reconnaissance, but our idea from the beginning was that they were not oil territory." (R. 3014)

Here is a flat and undisputed statement that neither Owen, nor Dumble, nor Treadwell even thought or believed that these lands were oil lands, and neither Dumble, nor Eberlein ever saw them.



## POINTS OF LAW AND AUTHORITIES CITED FIRST

WHEN THE UNITED STATES GOES INTO ITS OWN COURTS FOR EQUITABLE RELIEF, IT HAS THE SAME RIGHTS AND REMEDIES, AND IS GOVERNED BY THE SAME PRINCIPLES THAT ARE APPLICABLE TO INDIVIDUALS, EXCEPT ALONE THAT LACHES IS NOT ATTRIBUTABLE TO THE GOVERNMENT.

It is not to be presumed that the Government, in the present case, is seeking to cancel its patent to these lands on account of the fact that oil in California has enormously increased in value since 1904, nor can we presume that the discovery of appliances for using oil as fuel upon vessels of the navy, and the supposed need of the Government for a large supply of oil, induced the bringing of this suit.

On the contrary it must be presumed that the Government is acting in the utmost good faith, and is guided by the federal constitution, and is proceeding in accordance with Art. 5 of the Amendments to the Constitution, which provides:

“nor shall any person \* \* \* be deprived  
\* \* \* of property without due process of  
law, nor shall private property be taken for public use without just compensation.”

The Government is not proceeding arbitrarily and exercising a despotic force in seeking to take this property, but on the contrary, when the Government has thus filed its bill in equity in its own courts ask-

ing equitable relief, it thereby has declared that it is proceeding under the constitution, and that its rights, as well as the rights of the defendants, are to be determined by *the law of the land*, which in this case means the settled principles of equity as administered in the courts of the United States in suits between individuals.

In *United States v. Bell Telephone Co.*, 128 U. S. 315, 366, the court, quoting from *United States v. San Jacinto Tin Co.*, 125 U. S. 273, said:

“But we are of opinion that since the right of the government of the United States to institute such a suit depends upon the same general principles which would authorize a private citizen to apply to a court of justice for relief against an instrument obtained from him by fraud or deceit, or any of those other practices which are admitted to justify a court in granting relief, the government must show that, like the private individual, it has such an interest in the relief sought as entitles it to move in the matter. If it be a question of property, a case must be made in which the court can afford a remedy in regard to that property; if it be a question of fraud, which would render the instrument void, the fraud must operate to the prejudice of the United States.”

In *Maxwell Land-Grant Case*, 121 U. S. 325, at page 381, the court, speaking by Mr. Justice Miller, said:

“We take the general doctrine to be, that when in a court of equity it is proposed to set aside, to annul or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents, and other solemn evidences of title emanating from the government of the United States under its official seal.”

In *United States v. Iron Silver Mining Co.*, 128 U. S. 673, at page 676, the court said:

“The government has the same right to demand a cancellation of the conveyances of the United States when obtained by false and fraudulent representations as a private individual when a conveyance of his lands is obtained in like manner. In this respect the United States, as a landed proprietor, stands upon the same footing with the private citizen. The burden of proof in such cases is upon the government. The presumption attending the patent, even when directly assailed, that it was issued upon sufficient evidence that the law had been complied with by the officers of the government charged with the

alienation of public lands, can only be overcome by clear and convincing proof.”

In *Colorado Coal Co. v. United States*, 123 U. S. 307, 317, the court said, referring to the patent which the Government was seeking to vacate:

“It thus appears that the title of the defendants rests upon the strongest presumptions of fact which, although they may be rebutted, nevertheless can be overthrown only by full proofs to the contrary, clear, convincing, and unambiguous. The burden of producing these proofs and establishing the conclusion to which they are directed rests upon the government. Neither is it relieved of this obligation by the negative nature of the proposition it is bound to establish.”

In *Lalone v. United States*, 164 U. S. 255, 257, the court said:

“In all proceedings instituted to recover moneys or to set aside and annul deeds or contracts or other written instruments on the ground of alleged fraud practised by a defendant upon a plaintiff, the rule is of long standing and is of universal application, that the evidence tending to prove the fraud and upon which to found a verdict or decree must be clear and satisfactory. It may be circumstantial but it must be persuasive. A mere preponderance of evidence which at the same time is vague or ambiguous is not sufficient to warrant a finding of fraud, and will not sustain a judgment based on



such finding. The rule obtains in cases of alleged fraudulent representations made to an officer of the government upon the faith of which the officer has issued a patent or done any other official act upon which the rights of the party making the misrepresentations may be founded."

In *United States v. Stinson*, 197, U. S. 200, 204, a suit to vacate land patents for fraud, the court, speaking by Mr. Justice Brewer, said:

"While the government, like an individual, may maintain any appropriate action to set aside its grants and recover property of which it has been defrauded, and while laches or limitation do not of themselves constitute a distinct defense as against it, yet certain propositions in respect to such an action have been fully established. First, the respect due to the patent; the presumption that all the preceding steps required by law have been observed before its issue; the immense importance and necessity of the stability of titles depending upon these official instruments demand that suits to set aside or annul them should be sustained only when the allegations on which this is attempted are clearly stated and fully sustained by proof." Citing numerous authorities.

In *United States v. Clark* (C.C.A. 9th C.) 138 Fed. 294, 299, Ross, Circuit Judge, says:

"As a matter of course, when the government

comes as a suitor into a court of equity, its claims appeal to the chancellor with no greater force than do those of an individual under like circumstances, etc.”

## SECOND

### THE BASIS OF THIS SUIT FOR CANCELLATION.

The fundamental basis of a suit for cancellation of a written instrument, on the ground of fraudulent representations in its procurement, was stated by the court in *Southern Development Co. v. Silva*, 125 U. S. 247, 250, as follows:

“In order to establish a charge of this character the complainant must show by clear and decisive proof—

“First. That the defendant has made a representation in regard to a material fact;

“Secondly. That such representation is false;

“Thirdly. That such representation was not actually believed by the defendant, on reasonable grounds, to be true;

“Fourthly. That it was made with intent that it should be acted on;

“Fifthly. That it was acted on by complainant to his damage; and,

“Sixthly. That in so acting on it the complainant was ignorant of its falsity, and reasonably believed it to be true.”

*Slaughter’s Admr. v. Gerson*, 13 Wall. 379;

*Farrar v. Churchill*, 135 U. S. 609, 616;

Farnsworth v. Duffner, 142 U. S. 43, 47;  
Shappirio v. Goldberg, 192 U. S. 232, 241:

### THIRD

AS TO THE CHARACTER OF THE LAND THE GOVERNMENT HAD BEFORE IT AMPLE TESTIMONY ON BOTH SIDES OF THE CASE AND FAIRLY DECIDED THE FACTS, AND THE PATENT IS CONCLUSIVE, AS TO THE NONMINERAL CHARACTER.

McGoldrick v. Kinsolving, 221 Fed. 826, 827;

Chandler v. Calumet Mining Company, 149 U. S. 79, 89, 92;

McCormick v. Hayes, 159 U. S. 332, 338;

Rogers, etc., Company v. American Emigrant Co., 164 U. S. 559, 574, 575;

Michigan Land Company v. Rust, 168 U. S. 589, 592:

The distinction is made in:

United States v. Minor, 114 U. S. 233, 239, and

Washington Sec. Co. v. United States, 234

U. S. 76, 78; that where the proceedings are purely *ex parte*, where no issue was framed, where no hearing was had that the findings by the patent are not conclusive.

In the present case numerous investigations were had; numerous reports as to the mineral or nonmineral character were made and finally a public hearing was had after two months' notice to invite and hear protests from adverse claimants.

## FOURTH

MINERAL LANDS ARE CONFINED TO THOSE LANDS KNOWN TO BE VALUABLE FOR THEIR MINERAL CONTENTS AT OR BEFORE THE TIME THEY ARE ENTERED OR PATENTED.

The congressional grant to the Southern Pacific Railroad Company, as well as other railroad grants, excludes "mineral lands," except coal and iron. The lands were to be identified by patents.

As to what definition should be given to the term "mineral lands" in this and other grants we must turn to the legislation of congress concerning the reservation and disposal of "mineral lands."

U. S. Revised Stats. section 2318, provides as follows:

"In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law."

"Section 2319. All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States, and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

Section 2320 contains the following provision:



“but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located.”

Section 2329 provides:

“Claims usually called “placers,” including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims.”

The settled principles established by numerous decisions interpreting the mineral land laws are as follows:

In order to issue a valid patent to land as mineral, it must have been established that the land contained valuable mineral deposits.

When it is sought to vacate a patent to land, issued as nonmineral, the fact as to the nonmineral character of the land is adjudicated and determined by the issuance of the patent itself which is conclusive on collateral attack, and can only be vacated on direct attack in a suit brought up by the Government upon full, clear and convincing evidence, that the land was known to contain valuable mineral deposits prior to the issuance of the patent.

*Barden v. Northern Pac. Railroad*, 154 U. S. 288;

*Chrisman v. Miller*, 197 U. S. 313, 321;

*Colorado Coal Co. v. United States*, 123 U. S. 307, 317;

United States v. Iron Silver Mining Co., 128 U. S. 673;

Sullivan v. Iron Silver Mining Co., 143 U. S. 431, 441;

Davis v. Weibbold, 139 U. S. 507;

Shaw v. Kellogg, 170 U. S. 312, 338;

Deffebach v. Hawke, 115 U. S. 392;

Burke v. Southern Pac. Railroad Co., 234 U. S. 669, 709;

Diamond Coal Co. v. United States, 233 U. S. 236, 239;

Washington Sec. Co. v. United States, 234 U. S. 76, 78;

McCaskill Company v. United States, 216 U. S. 504, 509;

Wright-Blodgett Co. v. United States, 236 U. S. 397;

## FIFTH

### WHAT CONSTITUTES DISCOVERY OF MINERAL AND MINERAL LANDS.

The act of congress of June 25, 1910, (36 Stat. 848) empowered the president to withdraw and reserve public lands. Under that act many millions of acres were withdrawn, but, prior to the withdrawals, numerous persons had gone upon the land to explore for mineral, especially for oil and the Department of Justice contended that none of these locations were valid as against the withdrawals unless actual discoveries of oil, in paying quantities, had been made

Carrying out this policy the Attorney General instituted numerous suits against these locators and in several instances receivers have been appointed to take charge of the oil and operate the properties pending the results of litigations.

The theory of the Government was and is in those cases, that a discovery of oil cannot be based nor sustained alone by geological indications, nor by expert opinions, nor by theories, as to seepages, outcroppings, anticlines, synclines and monoclines, but that oil can be discovered only under the mining laws by development work upon the property.

In this situation congress passed the act of June 25, 1910, and in section 2 of that act it is provided as follows:

“Sec. 2. That all lands withdrawn under the provisions of this act shall at all times be open to exploration, discovery, occupation, and purchase, under the mining laws of the United States, so far as the same apply to minerals other than coal, oil, gas, and phosphates: Provided, That the rights of any person, who, at the date of any order of withdrawal heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas bearing lands, and who, at such date, is in diligent prosecution of work leading to discovery of oil or gas, shall not be affected or impaired by such order, so long as such occupant or claimant shall continue in diligent prosecution of said work: And provided further, That

this act shall not be construed as a recognition, abridgement, or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands after any withdrawal of such land made prior to the passage of this act."

Congress, by this act, declared that locations of all of these claims should be made valid by the act only in case the locators proceeded "*in diligent prosecution of work leading to discovery of oil or gas.*"

The action of the courts in appointing receivers for these properties and the action of the Department of Justice in prosecuting these numerous cases, and the legislation of congress in this act of 1910, result in a consensus of opinion and interpretation of the law that *geological theory* cannot be substituted for *actual discovery* of oil and this concurrent construction, by different departments of the Government, harmonizes with the universal experience of oil operators as shown by the testimony in this case.

In the recent case of United States v. McCutchen, No. 12 Equity, U. S. District Court, Southern District of California, Judge Bledsoe on July 12, 1915, appointed a receiver for the tract of land involved in that suit, which was claimed by the Government on the one hand as having been reserved by the United States under authority of the act of 1910, and was claimed by the defendant as oil land located as a placer mining claim.

Judge Bledsoe ordered a receiver for this property upon the ground that the defendant locator had not



proceeded diligently, after his location, to *prosecute work leading to the discovery of oil*. That land was in the midst of the lands involved in the various suits of the Government to vacate patents to the Southern Pacific Railroad, and had the same geological indications of oil in 1904 as it had in 1910. Defendant McCutchen had as much evidence of the presence of oil, and the benefit of six years more of development in that vicinity than the railroad had when patents were issued for this land, in 1904, and yet it was assumed by the court, that no such discovery could have been made by McCutchen as would warrant a mineral location. (See also U. S. v. McCutchen, 238 Fed. 575).

In other words the Government "blows hot and blows cold." In one class of cases the Government can discover now from geological indications that lands years ago were known to contain valuable deposits of oil, but claims by a locator with all the evidence that the Government had, with years more of development, is not a sufficient discovery of oil to warrant a location.

To escape this ridiculous position, counsel for the Government ingenuously seek to distinguish between lands known to be mineral and lands upon which a discovery sufficient for location, may be made, but all the rulings have been that it requires more testimony and a stronger showing to prove that lands are *known to be valuable for mineral* than to show that the lands contain sufficient mineral to warrant a location.

The whole argument goes back to sections 2318,

2319 and 2320 U. S. Rev. Stats. In section 2318 it is declared that lands *valuable for mineral* are reserved from sale, and section 2319 declares that *all valuable mineral deposits in lands* are subject to location and purchase, while section 2320 declares that no location of a mining claim shall be made until a *discovery of mineral* on the land. There is no other definition in the laws of the United States as to what constitutes mineral lands subject to location. It is in all cases those lands *valuable for the minerals* which they contain, which are mentioned, and they cannot be located as mining ground until a discovery sufficient to warrant development has been made.

Every decision declaring what discovery of mineral is sufficient to warrant a location is an authority upon the question as to what are valuable mineral lands within the meaning of these statutes. No lands are proven to be *known* for their valuable mineral contents where sufficient mineral has not been discovered, to authorize their location. A thing cannot be known which has not been discovered.

In *Chrisman v. Miller*, 197 U. S. 313, the court again pointed out what was necessary in order to make a discovery sufficient to warrant location, and also what was meant by lands known to be valuable for mineral, and the court said at pages 321, 323:

“What is necessary to constitute a discovery of mineral is not prescribed by statute, but there have been frequent judicial declarations in respect thereto. In *United States v. Iron Silver*

Mining Company, 128 U. S. 673, a suit brought by the United States to set aside placer patents on the charge that the patented tracts were not placer mining ground but land containing mineral veins or lodes of great value, as was well known to the patentee on his application for the patents, we said (p. 683):”

“It appears very clearly from the evidence that no lodes or veins were discovered by the excavations of Sawyer in his prospecting work, and that his lode locations were made upon an erroneous opinion, and not upon knowledge, that lodes bearing metal were disclosed by them. It is not enough that there may have been some indications by outcroppings on the surface, of the existence of lodes or veins of rock in place bearing gold or silver or other metal, to justify their designation as ‘known’ veins or lodes. To meet that designation the lodes or veins must be clearly ascertained, and be of such extent as to render the land more valuable on that account, and justify their exploitation. Although pits and shafts had been sunk in various places, and what are termed in mining cross-cuts had been run, only loose gold and small nuggets had been found, mingled with earth, sand and gravel. Lodes and veins in quartz or other rock in place bearing gold or silver or other metal were not disclosed when the application for the patents were made.”

“It is true that when the controversy is between two mineral claimants the rule respecting the sufficiency of a discovery of mineral is more liberal than when it is between a mineral claimant and one seeking to make an agricultural entry, for the reason that where land is sought to be taken out of the category of agricultural lands the evidence of its mineral character should be reasonably clear, while in respect to mineral lands, in a controversy between claimants, the question is simply which is entitled to priority. That, it is true, is the case before us. But even in such a case, as shown by the authorities we have cited, there must be such a discovery of mineral as gives reasonable evidence of the fact either that there is a vein or lode carrying the precious mineral, or if it be claimed as placer ground that it is valuable for such mining.”

In *United States v. Lavenson*, 206 Fed. 755, the Government succeeded in vacating a patent issued to a mining claim, located as a lode for gold, and while other questions than discovery were involved in the case, the court said at page 762:

“Discovery is necessary to initiate a mining right. To constitute discovery, it is necessary that mineral-bearing rock in place be found, under such circumstances and of such a character that a reasonably prudent man, not necessarily a skilled miner, would be justified in expending time and money developing it, with the reason-



able expectation of finding ore in paying quantities. This implies, not only that the conditions warrant a reasonably prudent man in so proceeding, with such reasonable expectation, but that the applicant for patent has that expectation. The claim may be valuable for other purposes and the applicant may, in part, be actuated by knowledge of its nonmineral value."

"It may be, as contended, that Stevens was moved in his advice to Sawyer as much by the existence of the valuable growth of timber on the land as by the existence of gold in the ground, and that the timber could be advantageously used by the Iron Silver Mining Company. If such were the fact, it would not affect the applicant's claim to a patent. Probably in a majority of cases, where a placer claim is located, other matters than the existence of valuable deposits of mineral enter into the estimate of its worth. Its accessibility to places where supplies and medical attendance can be obtained for the men engaged in working upon it, and timber secured to support the drifting or tunneling which may be necessary, the facility with which water can be brought to wash the mineral from the earth, sand, or gravel with which it may be mingled, and the uses to which the land may be subjected when the claim is exhausted, may be proper subjects of consideration. A prudent miner, acting wisely in taking up a claim, whether for a placer

mine or for a lode or vein, would not overlook such circumstances, and they may in fact control his action in making the location. If the land contains gold or other valuable deposits in loose earth, sand, or gravel, which can be secured with profit, that fact will satisfy the demand of the government as to the character of the land as placer ground, whatever the incidental advantages it may offer to the applicant for patent."

In the important case of Multnomah Mining, Milling & D. Co. v. United States, 211 Fed. 100, the Circuit Court of Appeals for the Ninth Circuit decreed the cancellation of certain patents issued for lode claims in Washington state. In that case the mines had been actually worked for gold and gold had been actually extracted, but the court held that the *quantity* and *value* was not sufficient to show a *profitable* mine, and the court, speaking by Judge Gilbert, said at page 101 :

"The witnesses for the appellant were the officers and employes of that company. They testified to having found small quantities of flake and "flour" gold, and in one instance a small piece of gold which they call a "nugget," but which in some mining districts would be called coarse gold, but the extremely scant quantities found, and the testimony adduced, only tend to confirm the conclusions reached by the witnesses for the government. There is doubtless in the land in

controversy a small quantity of fine gold, such as may be found in all the lands along the Columbia river from its headwaters to the ocean. But the proof is convincing that no gold in paying quantities has been discovered on these claims. If the land included in these placer claims was mineral land, or contained mineral sufficient to justify mining, that fact was capable of demonstration. The suit to set aside the patents was brought in March, 1908. The testimony of the appellant was taken in July, 1909. In the interval between those dates, there was ample time for the development and ascertainment of the mineral value of the land. For one month in that interval, the appellant did operate a sluice box, at which three men worked, but the the quantity of gold produced was so inconsiderable as to indicate the futility of further operation. We have carefully considered the contention of the appellant that while the ground may not be operated at a profit by panning or sluicing, it might be successfully mined by the hydraulic process. But the suggestion is a mere conjecture, based upon no tangible or scientific evidence, and it does not avail to sustain the validity of mining claims which were so evidently initiated without the discovery which the law requires."

The contention in the present case is that the patents are voidable for the alleged reasons, that each

tract was *known mineral land, prior to patent*, and known to contain valuable deposits of petroleum.

Before this land could be located as oil land, it would be necessary to prove that the land not only contained petroleum but that the land was *chiefly valuable* on account of its petroleum deposits. The act of congress of February 11, 1898, 29 Stat. 526, authorized the location, under the placer mining laws, of lands containing petroleum or other mineral oils and *chiefly valuable therefor*.

So that when the agents of the railroad company, not having pretended to have sunk any wells upon the property, nor representing that any other person had drilled any oil well, nor made any actual discovery of oil, stated in its information and belief this land was non-mineral, this was a mere statement of opinion and could not have been, in its very essence, a statement of fact, either that the land did not contain valuable deposits of petroleum or mineral oil, nor that the land was not *chiefly valuable* for its petroleum or mineral oil.

In *Diamond Coal Co. v. United States*, 233 U. S. 236, the court cancelled certain patents issued to Thomas Sneddon and another for a body of land entered and patented as soldiers' additional homestead, and conveyed to the coal company, upon the ground that it was proven to the court that these lands were known to be valuable for coal at the time patents were issued. It was established by the evidence found by the court, (pages 241, 242, 243) that;



“The lands were in a valley, three or four miles in width, bounded on the east and west by foothills. \* \* \* Along the western base of the eastern hills was the outcrop of another coal bed. This outcrop had been weathered down and in some places covered by the wash from above, but it could be traced upon the surface for several miles. It had been opened up at different places, and the openings disclosed a coal bed, from six to fourteen feet in thickness, dipping to the west at an angle of from fifteen to twenty-five degrees from the horizontal. \* \*

\* This coal was of superior quality and recognized commercial value, and the rocks containing it were the coal-bearing strata of that region.

\* \* Attracted by this outcrop, the coal company opened a mine thereon, in the vicinity of these lands, in 1894. \* \* \* Sneddon was in charge of the attempt. He was acquainted with the lands and all their surroundings and was well informed upon the subject of coal mining.”

The court further stated at pp. 247, 248 that the evidence showed:

“With the requisite certainty that at the time of the proceedings in the land office the lands were known to be valuable for coal. \* \* \* They were all adjacent to the outcrop and above the place of the coal-bearing strata dipping under the valley. In alternate even-numbered sections they substantially paralleled the outcrop

for seven miles, and in two places were separated from it by only a few rods. Those to the north were opposite the company's developed mine No. 4, and those to the south were opposite the tract acquired through Lees, upon which good coal was disclosed. The outcrop, the disclosures in the vicinity, and the geological formation pointed with convincing force to a workable bed of merchantable coal extending under the valley and penetrating these lands."

The Supreme Court recognized that there was a distinction between valuable coal beds lying flat or horizontal and other mineral deposits, which lie in veins or in lodes or kidneys, and the court used the following guarded language:

"It will be perceived that we are not here concerned with a mere outcropping of coal with nothing pointing persuasively to its quality, extent or value; neither are we considering other minerals whose mode of deposition and situation in the earth are so irregular or otherwise unlike coal as to require that they be dealt with along other lines."

The law of the case was stated by the court in part as follows:

"If at that time the land was not thus known to be valuable for mineral, subsequent discoveries will not affect the patent. The inquiry must be directed to the situation at that time, as were the applicant's proofs and the finding of the land

officers. If the proofs were not false then, they cannot be condemned, nor the good faith of the applicant impugned, by reason of any subsequent change in the conditions. We say 'land known at the time to be valuable for its minerals,' as there are vast tracts of public land in which minerals of different kinds are found, but not in such quantity as to justify expenditures in the effort to extract them. It is not to such lands that the term 'mineral' in the sense of the statute is applicable. \* \* \* We also say lands known at the time of their sale to be thus valuable, in order to avoid any possible conclusion against the validity of titles which may be issued for other kinds of land, in which, years afterwards, rich deposits of mineral may be discovered."

In *Burke v. Southern Pacific Railroad Co.* 234 U. S. 669, at page 700, the court by Mr. Justice Van Devanter, quoting with approval from *Barden v. Northern Pacific Railroad Co.*, 19 L. D. 188, said:

"It would seem from this uniform construction of that Department of the Government specially intrusted with supervision of proceedings required for the alienation of the public lands, including those that embrace minerals, and also of the courts of the mining States, Federal and state, whose attention has been called to the subject, that the exception of mineral lands from grant in the acts of Congress should

be considered to apply only to such lands as were at the time of the grant (patent) known to be so valuable for their minerals as to justify expenditure for their extraction. The grant or patent, when issued, would thus be held to carry with it the determination of the proper authorities that the land patented was not subject to the exception stated."

And the court further said at page 705:

"These decisions are applicable and controlling here. The reasoning upon which they proceed compels their reaffirmance, and besides, they have come to be recognized as establishing a rule of property."

In *United States v. Plowman*, 216 U. S. 372, 374, the court speaking by Mr. Justice Holmes, said concerning the right of miners to cut timber on mineral lands:

"The matter was much discussed in *Davis v. Webb*, 139 U. S. 507, and there it was said that the exceptions of mineral land from preemption and settlement, etc., 'are not held to exclude all lands in which minerals may be found, but only those where the mineral is in sufficient quantity to add to their richness and to justify expenditure for its extraction, and known to be so at the date of the grant.'"

In *United States v. Kostelak*, 207 Fed. 447 at pages 452, 453, Judge Bourquin of Montana said:

"Outcroppings of mineral upon certain land



are more or less evidentiary but by no means conclusive of its mineral character, and off the land their value as evidence rapidly lessens. The mountains of the West and the adjacent valleys and plains are ribbed with mineral vein outcroppings. They indicate possibilities or probabilities of valuable mineral deposits, but they are only indications. The country is pockmarked with prospect holes upon them. Some resolve these possibilities into realities and disclose valuable minerals, but far more fail therein, so that it is a common and truthful saying, born of costly and sad experience, that but one prospect in a thousand warrants development and unearths mineral deposits of value. Lands of great agricultural value and devoted solely to agricultural uses often contain these croppings of no value. The distance any vein may continue is notoriously uncertain, and presumptions are to be cautiously indulged. This is illustrated by *Dahl v. Raunheim*, 132 U. S. 263, 10 Sup. Ct. 74, 33 L. Ed. 324, wherein it is held that a vein of quartz exposed 200 or 300 feet without the boundaries of a placer claim and trending in the direction of said claim, as would appear from the record in said case, is not presumed to extend within it." \* \* \*

"To the argument that, unless these beliefs, speculations, presumptions are indulged, the government by nonmineral or agricultural entry

may be unlawfully deprived of lands that time and development may prove to contain valuable mineral deposits may be responded that conditions at the time of entry and sale govern; that, if the lands are placed on the market, and at entry and sale are not known to contain such deposits, a nonmineral or agricultural entry is the only lawful entry that can be made thereon; it is not unlawful deprivation but lawful sale; and, if time and development should discover mineral deposits of the greatest value therein, that is the good fortune of the entryman at which the government nor any can cavil. Furthermore, if the government desires to retain to itself the possibilities of mineral deposits of value, Congress can legislate to that end that lands containing any indications of minerals shall be classed as and entered and sold as mineral lands, or that as provided by Acts June 22, 1910, c. 318, 36 Stat. 583 (U. S. Comp. St. Supp. 1911, p. 614), the surface may be entered under nonmineral laws, the coal, if any, being reserved, or the land department can withdraw such lands from nonmineral or agricultural entry, even as it did the land here involved, and, if it is believed the geological conditions are such that valuable deposits may exist therein, can maintain the withdrawal until time and development determine."

In *Barnard Realty Co. v. Nolan*, 215 Fed. 996, the court said at page 999:

“Float, outcroppings, lodes, and abandoned locations, separately or combined, are not sufficient to constitute a ‘known lode’ within the exclusion of the placer mining law. To be impressed with such character the lode must, at the time of application for the placer patent, be clearly ascertained and defined, and of such extent and content that it will then, in view of conditions then, justify development and exploitation, and because of which the placer claim is valuable and more valuable than for placer mining purposes. Subsequent development, however marvelous the results, is immaterial if the lode be not thus ‘known’ when the application for the placer patent is made. And the reason is lode outcrops exist everywhere in the mining country. Not one in hundreds develops into a profitable mine. Valueless, no reason exists to exclude them from public grants and patents, and such grants made and patents issued without excluding them *prima facie* lodes of value do not exist. See *Iron Silver Case*, 143 U. S. 405, and cases cited; *Migeon v. Ry. Co.*, 77 Fed. 256, 23 C. C. A. 156.”

In *Clark Montana Realty Co. v. Ferguson*, 218 Fed. 959, at page 964, the court said:

\* \* \* The issue is determined now by conditions as they were when the placer patent was applied for, even as though tried and determined then. Subsequent development and

results, however marvelous, are immaterial. For if they are received in evidence and given evidentiary value, judgment is not based upon conditions as they were when the placer patent was applied for, but upon subsequent events, not consequences—the most fallible and dangerous of all criteria. The sanctity of a solemn grant of lands by the United States and the definiteness and certainty that should attach thereto and the stability of titles evidenced thereby, can only thus be preserved. See *Iron Silver Case*, 143, U. S. 405; *Migeon v. Railway Co.*, 77 Fed. 256, 23 C. C. A. 156; *Thomas v. Mining Co.*, 211 Fed. 106, 128 C. C. A. 33; *Mason v. Mining Co.*, 214 Fed. 34, 130 C. C. A. 426.”

“To revert to the evidence herein, all of subsequent development, disclosures, results, and conditions not consequent, is inadmissible and not considered. It will not do to contend that what is upon the premises now is some evidence of what was upon them then, for that is not the issue; it being what was known to be upon the premises then.”

In the recent and important case of *United States v. McCutchen*, 238 Fed. 575, in which the Government seeks recovery of oil lands upon the ground that no valuable mineral discovery had been made upon them by the locators, Judge Bledsoe says:

“The well-known litigation between Miller and Chrisman ultimately found its way into the



Supreme Court of the United States. 197 U. S. 313. That tribunal, in affirming the judgment of the courts of California, had occasion to express itself with reference to what constitutes a sufficient discovery under the act of 1897. If I mistake not, it is the only case in which the highest tribunal in the land has announced its conclusion with respect to this particular matter. Preliminarily, it should be observed that the 'discovery' therein relied upon was in fact a discovery of mineral, to-wit, petroleum. That only a small amount, such as would run from a spring, float over the water, and drip down over a 'rock about two feet high,' was the quantity discovered, is true; but the fact to which I desire to draw particular attention is that oil itself was actually discovered. This, I think, serves to give added point also to the conclusions of the Supreme Court. After adverting to the language of the act of 1897, providing that lands 'chiefly valuable' for oil could be located, the court says of the above-mentioned Barrieau discovery:—

'It does not establish a discovery. It only suggests a possibility of mineral of sufficient amount and value to justify further exploration.'

"And this is must be remembered is with respect to a discovery involving the finding of petroleum itself."

\* \* \* \* \*

“The court then, adverting to the liberality of the rule as between adverse claimants to mineral land, with respect to what will constitute a ‘discovery,’ and after conceding that that was the case then before the court, proceeds to hold that:”

‘Even in such a case \* \* \* there must be such a discovery of mineral as gives reasonable evidence of the fact \* \* \* if it be claimed as placer ground, that it is valuable for such mining.’

“Adopting the conclusion thus announced, there is nothing in the case at bar tending to show that the quantity of gas actually encountered had at the time of its discovery, or at any period up to the time of this trial, any appreciable commercial value, or that its presence in the land, in the quantity in which it was found, served to impress upon the land any value at all. In the absence of such showing, in the face of this decision, I do not see how defendants’ contentions can be accepted.”

“In *Cook v. Johnson*, 3 Alaska, 506, 534, et seq., the district court, in considering the sufficiency of a discovery under the placer law, calls attention to this holding of the Supreme Court in *Miller v. Chrisman*, and indulges in the observation, which is very persuasive with me, that the court used the language employed there as indicative of an intention to lay down a somewhat dif-

ferent rule with respect to the sufficiency of a discovery under the petroleum act, as differentiated from one under the general mining law.”

As showing that the right to locate public land as mineral, must be preceded by discovery of a *valuable mineral deposit*, Judge Bledsoe quotes with approval from the following cases:

Castle v. Womble, 19 L. D. 455, 457;

Cook v. Johnson, 3 Alaska, 506, 534;

Butte Oil Company Case, 40 L. D. 602;

Olive Land Etc. Co. v. Olmstead, 103 Fed. 568:

Opinion by Judge Ross.

Southwestern Oil Co. v. A. & P. R. Co. 39 L. D. 35;

Bay v. Oklahoma etc. Gas Co. 13 Okl. 425, 73 Pac. 936;

New England Oil Co. v. Congdon, 152 Cal. 211;

McLemore v. Express Oil Co., 158 Cal. 559;

Miller v. Chrisman, 140 Cal. 440;

## SIXTH

### LANDS IN SUIT WERE NOT EXCEPTED FROM SOUTHERN PACIFIC GRANT.

The grant to the Southern Pacific of July 27, 1866, (14 Stat. 292) was of \* \* \* “alternate sections of public land not mineral, designated by odd numbers.” \* \* \*

The mineral lands of the United States as we have seen from the legislation of congress and decisions

of courts, are all those lands containing “*valuable* mineral deposits.”

Section 2319 U. S. R. S. provides as follows:

“All *valuable* mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase.” \* \* \*

Section 2320 declares:

“No location of a mining claim shall be made *until the discovery* of the vein or lode within the limits of the claim located.”

Section 2325 declares:

“A patent for any land claimed and located for *valuable* deposits may be obtained in the following manner \* \* \* (*Italics ours*)”

Section 2329 provides:

“Claims usually called placers, including all forms of deposits excepting veins of quartz or other rock in place, shall be subject to entry and patent under like circumstances and conditions and upon similar proceedings as are provided for vein or lode claims.”

In *Northern Pacific Railway v. Soderberg*, 188 U. S. 526, 536, the court said:

“That mineral lands include not merely metalliferous lands, but all such as are chiefly *valuable* for their deposits of a mineral character, which are useful in the arts or valuable for purposes of manufacture.”

The only public lands in odd sections within the



limits of the Southern Pacific grant, which were taken out of and excepted from that grant, were the "mineral lands," meaning thereby such lands as were open to location and entry under the mining laws of the United States. All other lands passed under the grant to the Southern Pacific, and as to indemnity when selected and patented, the patent would convey a perfect title.

No public lands under the terms of this act, could have been excepted from this grant unless they contained "VALUABLE DEPOSITS," and no such lands could be located and acquired from the United States unless a "DISCOVERY OF VALUABLE DEPOSITS" had been made.

It is established beyond question in this case that none of these lands in suit were actually known to contain "valuable deposits of mineral" sufficient to have warranted a mineral location prior to the patent in 1904.

The lands in suit at that time not having been subject to location under any of the mineral laws, they could not have been excepted from the grant as mineral.

## SEVENTH

THE RAILROAD DID NOT MAKE ANY MISREPRESENTATION AS TO ANY MATTER OF FACT. ITS NONMINERAL AFFIDAVIT ON INFORMATION AND BELIEF WAS A MERE STATEMENT OF OPINION AND NOT ACTIONABLE.

The fundamental basis of a suit for cancellation

of a contract, on the ground of fraudulent representations, stated in *Southern Development Company v. Silva*, 125 U. S. 247, 250, and in other cases above cited, was:

“In order to establish a charge of this character the complainant must show by clear and decisive proof:—

“First. That the defendant has made a representation in regard to a material fact.” Citing:

*Attwood v. Small*, 6 Cl. and Finn, 232 (House of Lords);

*Jennings v. Broughton*, 5 DeGex, Macnaghten and Gordon, 126;

*Tuck v. Downing*, 76 Ill. 71, 94;

And the court quoted from the latter case, the following extract with approval.

“No man, however scientific he may be, could certainly state how a mine, with the most flattering outcrop or blowout, will finally turn out. It is to be fully tested, and worked by men of skill and judgment. Mines are not purchased and sold on a warranty, but on the prospect. ‘The sight’ determines the purchase. If very flattering, a party is willing to pay largely for the chance. There is no other sensible or known mode of selling this kind of property. It is, in the nature of the thing, utterly speculative, and everyone knows the business is of a most fluctuating and hazardous character. How many

mines have not sustained the hopes created by their outcrop!" (125 U. S. 252)

In *Bell v. Morley*, 223 Fed. 628, 630, C. C. A. Ninth Circuit, the court affirmed a decree of the court below, adjudging that representations based upon estimates as to the quantity of timber on a tract of land were not actionable and were only matters of opinion, and the court said:

"In the present case the parties had before them, pending the negotiations for the sale, certain estimates showing the quantity of timber on the land according to a cruise made some years before. This cruise was not made by the agent who represented the appellees in the negotiations for the sale of the property; he had no personal knowledge as to the quantity of timber on the land, and did not claim to have. Any statement made by him was therefore a mere matter of opinion, based on information furnished by third persons, known by the appellants to be such, and, so far as the record discloses, that opinion was expressed in the utmost good faith."

"To furnish grounds for an action of deceit the representation must be of a matter susceptible of approximately accurate knowledge, and must be in form or substance an assertion importing knowledge on the part of the speaker. A statement which by reason of its form or subject-matter amounts merely to an expression of opin-

ion is not actionable, for it is one upon which reliance cannot safely be placed. 20 Cyc. 17.”

The bill of complaint alleges, in the present case as the ground of cancellation, that the patentee made false and fraudulent representations of fact as to the nonmineral character of the land; that the patentee knew the statements were false and alleges that the plaintiff had no knowledge of the actual facts, and that the plaintiff relied upon the representations and affidavit of the patentee and was induced, by such false and fraudulent representations, to issue the patent in question. The evidence shows that all of these allegations are untrue, that the actual facts, as to the land being mineral or nonmineral, so far as ascertained by anyone, were open and notorious, and known to the plaintiff and to all others, and that no facts were known to the patentee which established or proved the mineral character of the land. All of the testimony agrees that the opinion that oil existed in valuable quantity, quality and at a workable depth, was a matter of speculation, prognostication or divination proven only by the drill.

The “nonmineral” affidavit was only made on information and belief. *R. 3832, 3850*

In *Synnott v. Shaughnessy*, 130 U. S. 572, which was a suit for cancellation, the bill of complaint alleged, in substance; that the defendant misrepresented to the plaintiff, the facts in regard to a large body of ore, which it was alleged the defendants had



knowledge of and concealed from the plaintiff, and the court said at pages 579, 580:

“The only indications of any such ore body or vein that had been found were simply a few small pieces of ore known as ‘float’ ore, which did not of necessity indicate the existence of any large ore body. Further, the fact that Porter had found ‘float’ ore on the claim was made known to the plaintiffs before they made the deed for the claim. Such purely surface indications, open to all ordinary observers, and situated on or near the path along which the plaintiffs travelled in going to and from their work, must have been known to them, and are not such as to be made the subject of concealment and misrepresentation. The fact, however, that there was no such discovery of an actual vein or body of ore demonstrates that there could have been no such fraudulent and collusive concealment and misrepresentation, as to its limit and extent, as is charged in this complaint. It required not only a considerable excavation, but also a great outlay of money and great labor on the part of the defendant to develop the existence of a vein of ore.”

In the case of *Gordon v. Butler*, 105 U. S. 553, 557, the court held, that misrepresentations as to value and mineral contents of land, not actually explored by excavation, was not actionable but were mere ex-

pressions of opinion upon which the plaintiff had no right to rely, and the court said:

“The case of *Holbrook v. Connor*, which arose in the Supreme Court of Maine, illustrates this doctrine. There the vendor and his agent represented, among other things, that lands sold by them contained large deposits of oil, and were of great value for the purpose of digging, boring for, and manufacturing it; and upon the representations the purchasers acted. The evidence tended to show that the representations were false and fraudulent, and the plaintiff obtained a verdict; but the Supreme Court set it aside. It appeared that the land had not been tested; and it was unknown to both parties whether it was valuable as oil land, except so far as might be inferred from the production of wells of neighboring lands, and a single well upon the land in question. The court held that under these circumstances the representation was to be regarded as a matter of opinion, and would not support the action.” (60 Me. 578).

“Whenever property of any kind depends for its value upon contingencies which may never occur, or developments which may never be made, opinion as to its value must necessarily be more or less of a speculative character; and no action will lie for its expression, however fallacious it may prove, or whatever the injury a reliance upon it may produce. The determination

of its truth or falsity, until the contingency occurs or becomes impossible, would lead the court into investigations for which they have no fixed rules to guide their own judgments or to instruct juries.”

This doctrine is sustained in:

Kimber v. Young, 137 Fed. 744, 749 C. C. A.;

Mooney v. Miller, 102 Mass. 217;

Cooper v. Lovering, 106 Mass. 77;

Holbrook v. Connor, 60 Me. 578:

In Rendell v. Scott, 70 Cal. 514, the court said:

“It was certainly matter of opinion when the plaintiff stated that the land \* \* \* was very rich and productive \* \* \* that a portion of it was good alfalfa land *and that another portion was rich in mineral deposits.*” (Italics ours)

Lee v. McClelland, 120 Cal. 147;

Bickel v. Munger, 129 Pac. 958: (Cal. Ap.)

In Sullivan v. Iron Silver Mining Co., 143 U. S. 431, 435, 436, the court again distinguished between known mines and theories, beliefs and speculative testimony, and the court said:

“Defendants offered a mass of testimony, the scope of which was similar to that condemned as insufficient in the case of Iron Silver Mining Co., v. Reynolds, *supra*, (124 U. S. 374). Its purport was that it was commonly believed that underlying all the country in that vicinity was a nearly horizontal vein or deposit, frequently called a

blanket vein; and that the parties who were instrumental in securing this placer patent shared in that belief, and obtained the patent with a view to thereafter developing such underlying vein. But whatever beliefs may have been entertained generally, or by the placer patentees alone, there was up to the time the patent was obtained no knowledge in respect thereto. It was, so far as disclosed by this testimony, on the part of everybody, patentees included, merely a matter of speculation and belief, based not on any discoveries in the placer tract, or any tracings of a vein or lode adjacent thereto, but on the fact that quite a number of shafts sunk elsewhere in the district had disclosed horizontal deposits of a particular kind of ore, which it was argued might be merely parts of a single vein of continuous extension through all that territory. Such a belief is not the knowledge required by the section. In the case referred to this court said: 'There may be difficulty in determining whether such knowledge in a given case was had, but between mere belief and knowledge there is a wide difference. The court could not make them synonymous by its charge, and thus in effect incorporate new terms into the statute.'

## EIGHTH

PRIOR TO THE ISSUANCE OF THE PATENT AND AFTER SELECTION BY THE RAILROAD THE UNITED STATES, BY ITS



OWN AGENTS, INVESTIGATED THE LAND AS TO ITS CHARACTER AND CANNOT BE HEARD TO SAY THAT IT WAS IMPOSED UPON BY FALSE REPRESENTATIONS.

The Ryan reports, copied above (R. 1549, 1559), set forth that by direction of the Commissioner of the General Land Office, Ryan personally investigated and twice reported as to the character of the lands covered by this patent, and found that they were not known to be valuable oil lands. There was also a hearing in the Land Office after eight weeks' notice to the public (R. 3860). In the face of these investigations the Government cannot be heard to say that it was imposed upon by any false representation.

In *Slaughter's Admr. v. Gerson*, 13 Wall, 379 at page 383 the court stated the rule as follows:

“Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived by the vendor's misrepresentations. If, having eyes, he will not see matters directly before them, where no concealment is made or attempted, he will not be entitled to favorable consideration when he complains that he has suffered from his own voluntary blindness, and been misled by overconfidence in the statements of another. And the same rule obtains when the complaining

party does not rely upon the misrepresentations, but seeks from other quarters means of verification of the statements made, and acts upon the information thus obtained.”

In *Southern Development Company v. Silva*, 125 U. S. 247 at page 259, the court said :

“It is essential that the defendant’s representations should have been acted on by complainant, to his injury. Where the purchaser undertakes to make investigations of his own, and the vendor does nothing to prevent his investigation from being as full as he chooses to make it, the purchaser cannot afterwards allege that the vendor made misrepresentations.”

In the *United States v. San Jacinto Tin Co.*, 125 U. S. 273, 299, the court refused to vacate or even to cast a doubt upon a patent issued by the United States where its annulment was sought on the ground of fraud in its procurement, where it appeared as it did in that case that the facts had been investigated by the Government prior to the issuance of the patent, and the court said :

“We consider this examination of the case in the office of the Commissioner and its re-examination by the Secretary of the Interior as possessing the very strongest probative force in regard to the question of fraud, which was mooted before them, as well as the question of the proper location of the grant. No stronger evidence could be given of the honesty of Commissioner

Wilson and his belief in the correctness of the survey than the fact of his reference of the whole matter to the Secretary of his own motion without any appeal by either party from his decision. They had in the Land Office abundant materials for the investigation of all the matters in dispute; they had before them the interested parties, with all the evidence which they could collect, the records, the Mexican archives and control of all the papers of the government since the territory came into the possession of the United States, as well as ample time, more than this court has, to consider all these subjects. Very little that is new or that throws any light upon the questions at issue is now produced on the hearing of this case.”

The present case is much like the San Jacinto Tin case in the following important respects:

In both cases there was an examination of the questions of fact by the Commissioner of the Land Office, and reports by him upon the subject.

In both cases the Interior Department had before it all of the material facts, which could have been adduced upon the hearings. The fact is, in the present case, there is no material fact before the court that was not before the Interior Department, and contained in reports to or publications of the Government.

In *Farnsworth v. Duffner*, 142 U. S. 43, at page 48, the court said:

“In the case of *Attwood v. Small*, decided by the House of Lords, and reported in 6 Cl. and Finn. 232, 233, it is held that ‘if a purchaser, choosing to judge for himself, does not avail himself of the knowledge or means of knowledge open to him or to his agents, he cannot be heard to say he was deceived by the vendor’s representations.’ And in 2 Pomeroy’s *Equity Jurisprudence*, section 892, it is declared that a party is not justified in relying upon representations made to him. ‘1. When, before entering into the contract or other transaction, he actually resorts to the proper means of ascertaining the truth and verifying the statement. 2. When, having the opportunity of making such examination, he is charged with the knowledge which he necessarily would have obtained if he had prosecuted it with diligence. 3. When the representation is concerning generalities equally within the knowledge or the means of acquiring knowledge possessed by both parties.’

“But if the neglect to make reasonable examinations would preclude a party from rescinding a contract on the ground of false and fraudulent representations, a fortiori is he precluded when it appears that he did make such examination, and relied on the evidences furnished by such examination, and not upon the representations.”



In *Shappirio v. Goldberg*, 192 U. S. 232 at pages 241, 242, the court said:

“When the means of knowledge are open and at hand or furnished to the purchaser or his agent and no effort is made to prevent the party from using them, and especially where the purchaser undertakes examination for himself, he will not be heard to say that he has been deceived to his injury by the misrepresentations of the vendor.”

In Pomeroy's *Eq. Juris.*, volume 2, section 893, the author lays down the following general principle applicable to this question:

“If, after a representation of fact, however positive, the party to whom it was made institutes an inquiry for himself, has recourse to the proper means of obtaining information, and actually learns the real facts, he cannot claim to have relied upon the misrepresentation and to have been misled by it. Such claim would simply be untrue. The same result must plainly follow when, after the representation, the party receiving it has given to him a sufficient opportunity of examining into the real facts, when his attention is directed to the sources of information, *and he commences, or purports or professes to commence, an investigation* (italics ours). The plainest motives of expediency and of justice require that he should be charged with all the knowledge which he might have obtained had he pursued the

inquiry to the end with diligence and completeness. He cannot claim that he did not learn the truth, and that he was misled.”

Citing among numerous other cases:

Farrar v. Churchill, 135 U. S. 609;

The Government was not in anyway prevented, deterred or obstructed in investigating the character of the land in suit.

The Government did in fact investigate its character through numerous agents, and had numerous reports through a long series of years prior to issuing the patent.

The Government caused the land to be surveyed and all mineral land to be noted and had received the field notes of the survey of this Township (30-23) where it was reported in the field notes that there were veins of asphalt in this township indicating mineral. (R. 685, 686)

The Government also caused the land to be examined and reported upon in the year 1900 by special agent Cummings, who reported in effect, that a large vicinity of country thereabouts was probably oil land. (R. 3868, 3877)

In January, 1904, the same year this patent was issued, and prior to its issuance, *but after it was selected*, the Government caused these particular lands to be examined and reported upon by special agent E. C. Ryan, who reported the land as nonmineral. (R. 1550, 1551)

On March 22, 1904, the land was again reported

upon by special agent Ryan as nonmineral. (R. 1560, 1567)

The Government then directed a public examination by causing a notice to be published for eight weeks in a daily newspaper to the effect that lands were applied for as nonmineral and inviting contest, and posting a similar notice in the local land office for a like period. (R. 3860, 3858)

The Government therefore not only had the means of ascertaining the character of the lands and did cause an examination to be made to ascertain their character, but more than that, caused a series of examinations to be made and investigated the character of the lands to the fullest extent. The Government is therefore not permitted under the principles of equity, to say that it was deceived by any statement regarding their character in the issuance of the patent.

## NINTH

THE ACTS OF THE RAILROAD WERE IN HARMONY WITH THE RULES, DECISIONS AND PRACTICES OF THE COURTS AND INTERIOR DEPARTMENT WHEN THE SELECTION WAS MADE.

An inspection of the opinion shows that the learned judge of the District Court was somewhat confused in his conclusions, as to the alleged fraud of the railroad company by the habitual use by Government counsel of the expression for "lands known to be

valuable for their mineral contents” such words as “lands generally known to be mineral.”

Government counsel has sought to prove by hearsay, by loose neighborhood talk, by surmises, by suspicions and by geological prognostication that the lands in suit were in the language of Government counsel “generally known to be mineral,” and in the application of this expression, has substituted theory and beliefs for the actual facts.

The facts established in this case by Government testimony, that there were no oil seepages or oil wells upon any of these lands at any time, and the undisputed facts established that no oil wells had been drilled on these lands, or within four miles of them, prior to 1905, conclusively shows that there was no false representation, concealment or statement made by the railroad company in selecting these lands as lands not known to be valuable for their mineral contents when the selections were made.

The settled rules of decision of the Interior Department for years preceding the application to select in 1904, that department having control of the public lands and primarily charged with the construction of the acts of congress and their application, ought to be a guide to the court in this case as to what is meant by the term “mineral lands.”

In *Frees v. Colorado*, 22 L. D. 510, it was decided that openings on a tract of land disclosing surface coal, without proof of value and extent, were not



sufficient to prove the mineral character of the land as coal land.

In *Commissioners of Kings County v. Alexander*, 5 L. D. 126, 127, Secretary Lamar said:

“But it has been repeatedly held by this department that the proof of the mineral character of land must be specified and based upon the actual production of mineral; that it is not enough to show that neighboring or adjoining lands are mineral in character, and that the lands in controversy may hereafter develop minerals to such an extent as to show its mineral character, but it must be shown as a present fact that the lands are mineral, and this must appear from actual production of mineral and not from a theory that the lands may hereafter produce it.” Citing numerous decisions.

This rule of interpretation was followed in:

*Savage v. Boynton*, 12 L. D. 612, 614;

*Southwestern Oil Company v. Atlantic & Pacific R. R. Co.*, 39 L. D. 335;

*East Tintic Consolidated Mining Claim*, 40 L. D. 271;

*Butte Oil Company*, 40 L. D. 602;

Notwithstanding the conclusions of the learned judge, we submit that it is inconceivable for this court to so interpret the laws and rules of decision of the courts, and of the land department, prior to December 12, 1904, as to say that the Railroad Company was guilty of a fraud in representing that, in its opin-

ion, these lands were not mineral lands, when this statement, even if one of fact and not mere opinion, was in harmony with those decisions, rules and practices at the time the application to select was made.

## TENTH

### CONCLUSION

In conclusion it is submitted.

*First.* That the defendant railroad has not made any representation in regard to a material fact and has only purported, in its selections and affidavit, to state its opinions and beliefs as to the lands not being known to contain valuable minerals, based upon a superficial examination of the lands without any wells having been drilled or explorations made in the interior of the earth.

*Second.* That it has not been shown that any representation, made by defendant railroad, is false, for that no oil well has been sunk or other excavation made upon any of the numerous tracts involved in this suit, either prior to the date of the patent or at any time since, and no oil well, either before or since the date of the patent, has been sunk on any lands in the vicinity of the lands in suit, which has been shown to produce oil in commercially paying quantities.

*Third.* That the representations made by defendant railroad were not acted upon by the Government, or by the officers of the Interior Department, but on the contrary, the uncontradicted evidence shows that

from 1866 down to the date of the patent in 1904 the Government had caused numerous reports to be made concerning these lands, as to their mineral or non-mineral character, and *after* the railroad selected the land, the Government caused the land to be personally examined by its special agent, Ryan, who reported that the land was non-mineral, and instead of the representations, by the railroad on its information and belief, being relied upon, the Government repudiated such representations and not only secured but relied upon its own reports.

*Fourth.* That it has not been shown that the complainant was ignorant of any falsity in plaintiff's representations based upon information and belief, but on the contrary, the record conclusively established that the Government was better informed as to the mineral or nonmineral character of this land than the railroad or any other person.

The decree of the District Court should be reversed with direction to dismiss the bill of complaint.

JOSEPH H. CALL,  
GUY V. SHOUP,  
CHARLES R. LEWERS,  
Solicitors for Appellants.

Appellants "Points and Authorities" herein are accompanied by "Appellants' Brief Upon the Facts."

No. 2958.

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

SOUTHERN PACIFIC COMPANY, et al.,  
*Appellants,*  
VS.  
UNITED STATES OF AMERICA,  
*Appellee.*

In  
Equity.

BRIEF OF UNITED STATES, APPELLEE.

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MAY

F. L. Monckton,





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For the Ninth Circuit

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<i>Appellee.</i>		

## BRIEF OF UNITED STATES, APPELLEE.

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### Statement of the Case.

This suit in equity was brought by the United States on the tenth day of December, 1910, to the end that a decree might be obtained annulling and cancelling patent No. 135 to public lands issued to the Southern Pacific Railroad Company on the twelfth day of December, 1904, and procured, as the bill charges, in the execution of a fraudulent scheme to acquire mineral lands upon the representation that they were non-mineral and of the character contemplated by the grant of July 27, 1866, 14 Stat. at Large 292, and the joint resolution of June



28, 1870, 16 Stat. at Large 382, No. 87. The immediately pertinent provision is the grant to the Southern Pacific Railroad, a company incorporated under the laws of the State of California of which the appellant Southern Pacific Railroad Company is admitted by paragraph four of the answer to be the successor in interest, of every alternate section of public land not mineral, designated by odd numbers, to the amount of ten alternate sections of land per mile on each side of said railroad passing through any state, together with suitable provisions for indemnity or lieu lands, to be selected under the direction of the Secretary of the Interior, in alternate sections and designated by odd numbers not more than ten miles beyond the limits of the primary grant in cases in which, by reason of pre-emption, reservation or prior grant or sale, there occurred a failure in the primary grant; as also the following provision:

Provided further, That all mineral lands be and the same are hereby excluded from the operation of this act and, in lieu thereof, a like quantity of unoccupied agricultural lands in odd numbered sections nearest to the line of said road and within twenty miles thereof may be selected as above provided.

The lands in suit, comprising about six thousand acres and including parts of sections 17 and 19 and all of sections 15, 21, 23, 25, 27, 29, 33 and 35 of Township 30 South, Range 23 East, Mount Diablo Base and Meridian, are within the so-called indemnity limits of the grant and were, therefore, subject to selection by the railroad under the direction of

the Secretary of the Interior in lieu of lands within the so-called primary limits lost to the railroad by reason of any of the exceptions mentioned in the grant, provided they were not mineral lands and therefore within the exclusion of the proviso above set out. They are situated in a range of hills locally known as the Elk Hills and customarily so designated and referred to in the record; and the township itself is, for brevity, herein designated as "30-23."

July 9, 1894, pursuant to authority vested in him by the granting act, the Secretary of the Interior promulgated the following regulation with reference to railroad selections:

"Where the lands selected by the company are within a mineral belt or proximate to any mining claim, the railroad company will be required to file with the local land officers an affidavit by the land agent of the company, which affidavit shall be attached to said list when returned, setting forth in substance that he has caused the lands mentioned to be carefully examined by the agents and employes of the company as to their mineral or agricultural character and that, to the best of his knowledge and belief, none of the lands returned in said list are mineral lands." 19 L. D. 21.

## HISTORY OF LIST NO. 89.

The Southern Pacific Railroad Company first filed in the United States Land Office at Visalia, California, its list of selection of the lands in suit November 14, 1903 (Ex. 12 M; R. 3752). This list received the number 89 and throughout was designated as List No. 89. In accordance with the regulation of the Secretary of the Interior of July 9, 1894, *supra*, it was accompanied by the affidavits of the railroad's acting land agent, Charles W. Eberlein, following:

State of California,  
City and County of San Francisco—ss.

I, Charles W. Eberlein, being duly sworn, depose and say that I am the Acting Land Agent of the Southern Pacific Railroad Company, successor by consolidation to the Southern Pacific Railroad Company (of California); that the foregoing list of lands which I hereby select is a correct list of a portion of the public lands claimed by the said Southern Pacific Railroad Company, successor as aforesaid, as inuring to it to aid in the construction of the railroad of said company from Lerdo to Sumner for which a grant of lands was made by the acts of Congress approved July 27, 1866, July 25, 1868, and June 28, 1870, as aforesaid; that the said lands are vacant, unappropriated, and are not interdicted mineral or reserved lands, *and are of the character contemplated by the grant*, being within the limits of the exterior ten (10) miles indemnity belt, on each side of the line or route for a continuous distance of twenty (20) miles, being for the sixth (6th) section of said road, starting from a point in the N. E.  $\frac{1}{4}$  of Section 9, T. 28 S., R. 26 E., M. D. B. and M., and ending at a point in the N. E.  $\frac{1}{4}$  of Section 5, T.

30 S., R. 29 E., M. D. B. and M., and that the specific losses for which indemnity is claimed are truly set forth and described in said list, and that said losses have not heretofore been indemnified in any manner.

(Ink hand-writing) CHARLES W. EBERLEIN

(Seal)

Sworn and subscribed to before me this 7th day of November, 1903. Witness my hand and notarial seal.

(Ink hand-writing)

E. B. RYAN,

*Notary Public in and for the City and County of San Francisco, State of California.*

(Notarial seal)

(R. 3829-30).

State of California,

City and County of San Francisco—ss.

Charles W. Eberlein, being duly sworn, deposes and says that he is the acting land agent of the Southern Pacific Railroad Company, that he has caused the lands selected in said company's List No. 89 to be carefully examined by the agents and employees of said company as to their mineral or agricultural character, and that to the best of his knowledge and belief, none of the lands returned in said list are mineral lands.

(Ink hand-writing) CHARLES W. EBERLEIN.

Subscribed and sworn to before me this 7th day of November, 1903.

(Ink hand-writing)

E. B. RYAN,

*Notary Public in and for the City and County of San Francisco, State of California.*

(Notarial seal)

(R. 3831-3).



This list was rejected November 17, 1903 (R. 3756), by the Register and Receiver for the reason that the lands mentioned in the attempted selection were embraced in the telegraphic order of the Commissioner of the General Land Office of February 28, 1900, by which the Register and Receiver at Visalia had been instructed to "suspend from disposition until further orders" a large body of lands including the entire township of which the lands in suit are a part (Ex. QQQ—R. 1524-5). (Counsel for appellants referred below to this order as a "withdrawal from all forms of *agricultural entry*"—without reason, as is manifest from the words "suspend from disposition" without accompanying words of limitation or explanation.) This order was in full force and effect at the time of the filing of said list and its rejection (R. 3757). From the order of rejection the railroad appealed December 11, 1903 (Ex. 12-N—R. 3757, 3834), to the Commissioner of the General Land Office. The township in question was, by order of the Assistant Commissioner of the General Land Office, "relieved from suspension" February 11, 1904 (Ex. ZZZ—R. 1555-6, 3757,8), and February 20, 1904 (Ex. 4-A—R. 1557-8, 3757-8); also April 5, 1904 (Ex. 4-C—R. 1568-9-70), following a request of D. A. Chambers, attorney for the Southern Pacific Railroad Company, of November 30, 1903, addressed to the Commissioner of the General Land Office, that "a special agent be instructed to *at once* examine said lands"—the identical lands in suit—"and report thereon to your office." The specific directions by the Commissioner to the spe-

cial agent were to “examine the lands in question and thereafter submit report to this office stating whether or not in your opinion *the same should be relieved from suspension.*” (Italics supplied.)

February 20, 1904, the Commissioner wrote the Register and Receiver at Visalia advising them that their action in rejecting the application to select “was correct under conditions then existing”, (November 17, 1903), but that the lands sought to be selected had been subsequently “relieved from suspension” and that “it would therefore appear that said application to select may now be granted if no other objection thereto exists. *Quasi-contest* No. 2555 is accordingly hereby closed and selection list No. 89 herewith returned for appropriate action.” (Ex. 12-0; R. 3834-5, 3868-9.) The list, thus returned, was accepted by the Register at Visalia February 26, 1904, and Eberlein, the railroad’s acting land agent, was so notified by letter dated March 5, 1904. (Ex. 12-P; R. 3836-7, 3767, 3769-70.) Later in the General Land Office it was discovered that there were errors or informalities in the assignment of the base-lands upon whose loss the selection of the lands in list 89 was predicated and thereupon, on September 6, 1904, a new application to select was filed in the land office at Visalia for the identical lands in the former application and now in suit, but containing a new or re-arranged assignment of base lands and accompanied by the following affidavits by Eberlein, the railroad’s acting land agent (Ex. 12-Q—R. 3771-2):

State of California,  
City and County of San Francisco—ss.

I, Charles W. Eberlein, being duly sworn, depose and say: that I am the acting land agent of the Southern Pacific Railroad Company, successor by consolidation to the Southern Pacific Railroad Company (of California); that the foregoing list of lands which I hereby select is a correct list of a portion of the public lands claimed by the said Southern Pacific Railroad Company, successor as aforesaid, as inuring to it to aid in the construction of the railroad of said company from Lerdo to Sumner for which a grant of lands was made by the Acts of Congress approved July 27, 1866, July 25, 1868, and June 28, 1870, as aforesaid; that the said lands are vacant, unappropriated, and are not interdicted mineral or reserved lands, and are of the character contemplated by the grant, being within the limits of the exterior ten (10) miles indemnity belt, on each side of the line of route for a continuous distance of twenty (20) miles, being for the sixth (6th) section of said road, starting from a point in N. E.  $\frac{1}{4}$  of Section 9, T. 28 S., R. 26 E., M. D. B. and M., and ending at a point in the N. E.  $\frac{1}{4}$  of Section 5, T. 30 S., R. 29 E., M. D. B. and M., and that the specific losses for which indemnity is claimed are truly set forth and described in said list, and that said losses have not heretofore been indemnified in any manner.

(Seal)

(Ink hand-writing) CHARLES W. EBERLEIN

Sworn to and subscribed before me this 31st day of August, 1904.

(Ink hand-writing)

E. B. RYAN,  
*Notary Public in and for the City and County of  
San Francisco, State of California.*

(Notarial seal)

(R. 3847-8).

State of California,  
City and County of San Francisco—ss.

Charles W. Eberlein being duly sworn deposes and says that he is the acting land agent of the Southern Pacific Railroad Company; that he has caused the lands selected in said company's list No. 89 to be carefully examined by the agents and employees of said company as to their mineral or agricultural character, and that to the best of his knowledge and belief, none of the lands returned in said list are mineral lands.

(Ink hand-writing) CHARLES W. EBERLEIN.

Subscribed and sworn to before me this 31st day of August, 1904.

(Ink hand-writing)

E. B. RYAN

*Notary Public in and for the City and County of  
San Francisco, State of California.*

(Notarial seal)

(R. 3850-1).

Patent thereafter, December 12, 1904, numbered 135 issued to the Southern Pacific Railroad Company and is the instrument annulled and cancelled by the decree from which this appeal is prosecuted. That it is based upon the selection list accepted by the Register and Receiver at Visalia September 12, 1904, and not upon the list filed while the lands were under suspension from disposition, appears from the testimony of E. C. Finney, an assistant attorney in the office of the Assistant Attorney General of the Interior Department (R. 1589). This further appears from the fact that the description in the patent of the lands agrees with that in the list of September 6, 1904, but not with the description in the list filed November 14, 1903 (R. 3775-6). A photographic copy of the patent was filed as Exhibit 4-G.



## CONTENTIONS.

The bill charges in substance that this patent was obtained by the fraud of appellants in falsely representing through the affidavits of the acting land agent of the Southern Pacific Railroad Company that the lands described in it and now in suit were not interdicted mineral lands and were of the character contemplated by the grant and that he, the acting land agent, had caused them to be carefully examined by the agents and employees of the railroad company as to their mineral or agricultural character and that, to the best of his knowledge and belief, none of them was mineral land; that the purpose and effect of these affidavits were to deceive the land officers of the government; that they relied upon them and, in such reliance, issued the patent; that all of the lands were and are mineral lands and were known to be such at the time of the proceedings which resulted in the patent; and that their true character was known to appellants.

While upon this record it conclusively appears not only that the lands in suit were mineral lands and known to be such at the time of the proceedings which resulted in patent, but that the appellants, Southern Pacific Railroad Company, their officers and agents, knew their mineral character and coveted and sought to and did acquire them on account thereof and in defiance of the exception in the grant under which they claimed, it was only necessary that the government show by proper and relevant evi-

dence that the lands were known mineral lands and that appellants either knew their true character or could, by the exercise of the diligence imposed upon them by the terms of the grant and the regulation of the Secretary of the Interior and in the discharge of the duty which their relationship to the government dictated, have ascertained it. If the lands were known mineral lands, the affidavits in question were false; and, if they were false, the legal result is the same, whether they were knowingly false or were made in ignorance of ascertainable facts which it was the duty of appellants to know.

Accordingly, the only burden resting upon the government at the trial was to show by "that class of evidence which commands respect and that amount of it which produces conviction" that the lands in suit were at the time of the proceedings which resulted in the patent known mineral lands and, therefore, within the exception in the grant of mineral lands other than coal and iron. It will be the purpose of this brief to demonstrate that not only was this burden borne by the government, but that the record is entirely convincing that appellants knew the interdicted mineral character of the lands and, knowing it, falsely represented that they were non-mineral agricultural lands of the character contemplated by the grant.

**IDENTITY OF APPELLANT SOUTHERN PACIFIC RAILROAD  
COMPANY WITH THE SOUTHERN PACIFIC RAILROAD  
NAMED IN THE GRANT OF 1866.**

Paragraph four of the "joint and several answer of all defendants other than the Equitable Trust Company of New York," read in connection with paragraph four of the bill, would seem to establish by admission the legal identity of the appellant Southern Pacific Railroad Company and the corporation of like name mentioned in the granting act. If doubt remains, it is set at rest by Exhibits 11-E and 11-F, being respectively a certified copy of the articles of Incorporation and Consolidation of the Southern Pacific Railroad Company (of California), the Southern Pacific Railroad Company (of Arizona), and the Southern Pacific Railroad Company (of New Mexico) filed in the office of the Secretary of State March 8, 1902, and a certified copy of Amended Articles of Incorporation and Consolidation of the Southern Pacific Railroad Company filed in the office of the Secretary of State August 28, 1905.

**IDENTITY OF INTEREST OF SOUTHERN PACIFIC RAILROAD  
COMPANY AND SOUTHERN PACIFIC COMPANY.**

The Southern Pacific Company was incorporated in 1884 "for the purpose of unifying in management lines of railroad extending from New Orleans, Louisiana, to San Francisco, California, to Portland, Oregon, and to Ogden, Utah." This appears from Manual No. 1 for the year 1902 of the Southern Pacific and Auxiliary Companies issued to its officers, Ex. III (R. 1344). This manual was issued

July 1, 1902, and is from the files of the Secretary of the Southern Pacific Company. In it, on page 1344, under the caption "Controlled Properties," appears the following:

"The Southern Pacific Company is the principal owner of the capital stock of the following companies and operates them under lease to it:

Central Pacific Railway  
Oregon and California Railroad  
Southern Pacific Railroad of California  
Southern Pacific Railroad of Arizona  
Southern Pacific Railroad of New Mexico  
Southern Pacific Coast Railway.

The Southern Pacific is also the principal owner of the capital stock of the following companies which are operated by their own organizations, viz:

Galveston, Harrisburg & San Antonio Railway  
Texas and New Orleans Railroad  
New York, Texas and Mexican Railway."

The same manual (R. 1345), shows the following:

"In March, 1902, the Southern Pacific Railroad of California, the Southern Pacific Railroad of Arizona, and the Southern Pacific Railroad of New Mexico were consolidated into a new California company, the Southern Pacific Railroad Company."

Subsequent manuals, for the years 1903 to 1909, inclusive, constitute exhibits "JJJ" to "PPP," inclusive (R. 1355-1462), and show the continuation throughout the period covered by them of the conditions of operation and control by the Southern



Pacific Company of the Southern Pacific Railroad Company set out in manual number one above quoted.

From the foregoing the absolute control and operation by the Southern Pacific Company of all of the properties of the Southern Pacific Railroad Company is beyond question. Indeed, the government understands that it is not denied by appellants that since about 1885 the Southern Pacific Company has controlled and operated the Southern Pacific Railroad Company and all of its properties, including the lands granted by the granting act in question; and that in large measure officers of the one have been throughout that period officers of the other. Furthermore, Mr. Julius Kruttschnitt, who testified as a witness for appellants April 7, 1913, being at that time Chairman of the Executive Committee of the Board of Directors of the Southern Pacific Company, stated that from the autumn of 1901 to April 1, 1904, he was vice-president and assistant to the president of the Southern Pacific Company, being located at San Francisco, and had charge of the exploitation of oil lands and the production of oil for fuel purposes of the railroad company (R. 3080) and that both the president of the Southern Pacific Company and the president of the Southern Pacific Railroad Company had instructed him and those under him to go on the Southern Pacific Railroad Company's grant lands and develop oil (R. 3102).

It was C. H. Markham, general manager of the Southern Pacific Company, who in 1904 insisted

that Eberlein execute the lease to the Kern Trading & Oil Company of Southern Pacific Railroad Company lands, (Exhibits II—R. 1050-1; KK—R. 1053-4-5-6; LL—R. 1059-60; MM—R. 1061; NN—R. 1063-4; QQ—R. 1069; RR—R. 1070-1).

W. D. Cornish was in 1903 and 1904 vice-president of the Southern Pacific Company and the superior officer of Eberlein, the Southern Pacific Railroad Company's acting land agent (R. 1091, 1132; also R. 1095-6).

E. E. Calvin was vice-president and general manager of the Southern Pacific Company and called upon Eberlein for lists of lands of the Southern Pacific Railroad Company (R. 1098).

Eberlein, the railroad company's acting land agent, had a room and desk at 120 Broadway, New York City, the New York office of the Southern Pacific Company (R. 1271).

There was only one law department, that of the Southern Pacific Company "presided over" by William F. Herrin, and it was as well the law department of the Southern Pacific Railroad Company (R. 1310).

It is needless to further multiply references to the record to prove the palpable fact that the Southern Pacific Railroad Company was dominated and controlled by the Southern Pacific Company and that the officers of the latter did as they listed with

the properties of the former. Indeed, Mr. Kruttschnitt admitted that every share of the stock of the Southern Pacific Railroad Company was owned by the Southern Pacific Company (R. 3087-8).

**RELATION OF THE KEEN TRADING & OIL COMPANY TO THE  
SOUTHERN PACIFIC COMPANY AND SOUTHERN PACIFIC  
RAILROAD COMPANY.**

The Kern Trading & Oil Company was organized May 22, 1903, and was then and since then has at all times been owned by the Southern Pacific Company. It first appears in the manuals of the "Southern Pacific Company and Auxiliaries" for the year 1903 (R. 1357-8) and is carried in all subsequent manuals. Mr. Kruttschnitt testified that it and the Rio Bravo Oil Company "were really departments of the company (Southern Pacific Company) for exploiting oil lands and producing oil for fuel purposes—for fuel for the railroad." The government understands that it is conceded by counsel for appellants that the company was no more than the "fuel department" of the Southern Pacific Company and that its officers and servants were chosen and its acts and operations directed and controlled solely by the latter company.

**DESCRIPTION OF LANDS IN SUIT.**

The Elk Hills, in which lies the township of which the lands in suit are odd numbered sections of the southern half, is a range of hills in Kern County, California, approximately sixteen miles long and of six or seven miles maximum width. Rising rather

abruptly from the San Joaquin valley on the east side to an elevation of a thousand or twelve hundred feet and separated from the neighboring Buena Vista Hills to the south by a relatively level valley lying somewhat to the southwest, their trend is northwest and southeast and they are plainly seen from McKittrick, Taft and Maricopa, towns often referred to in the record and situated in the midst of developed oil fields. The region is one of low rainfall, the average yearly precipitation being only two inches, and is a broken, semi-arid desert. Erosion there is very slight, insomuch that it appeared at the trial in 1912 that these hills were then in essentially the same condition as during the period of the proceedings that resulted in patent (R. 688-9. Veatch; 1004), with the exception of such changes as had been wrought by the hand of man. The Temblor range is the principal uplift in the surrounding country and the Elk Hills at their westerly end are within a short distance of it. More detailed description of the geographical and other conditions may be found in the record in the testimony of B. K. Lee at pages 225-6, S. P. Wible at pages 320-1, and F. O. Martin at page 612.

#### THE RULE OF REVIEW IN APPELLATE COURTS.

The government is mindful of "the dignity and character of a patent from the United States" and that it is not to be lightly set aside. It is fully advertent to the decisions which require that, to cancel and annul such an instrument, the government shall bear the burden of proof and shall sustain it



by that class of evidence which commands respect and that amount of it which produces conviction. It is confidently submitted that, in determining that this burden was supported and that the material allegations of the bill were proven at the trial by evidence of the class and amount prescribed and in rendering in favor of the United States the challenged decree, the trial judge committed no error.

In the case of *Diamond Coal & Coke Co. vs. United States*, 233 U. S. 236; 58 L. Ed. 936, as in every other case in which the government has sued to set aside a patent, the solemnity of the government's own assurances of title has been stressed by those resisting the decree of annulment and rescission; and it is not novel that insistence in the instant case is directed to this point. It is to be presumed that the trial judge gave due consideration to this rule so elaborately invoked below and now here and came to the conclusion that the government had proved its case by evidence quantitatively and qualitatively responsive to the requirement of the pertinent formula.

At the time of preparing this brief the government has not the benefit of an examination of the brief of appellants which, under the rules, is not required to be filed more than fifteen days before argument. The record is so voluminous that it is impossible for the government to postpone the preparation and printing of its argument to the narrow interval between the times fixed by the rules

for filing the respective briefs of the parties. Accordingly, what the reliance of appellants will be can only be determined at this time by a consideration of their assignment of errors. It may be fairly assumed, however, that this court will not be asked to disturb the lower court's findings of facts in the absence of a showing that there is in the record no substantial basis upon which to predicate such findings. The pertinent rule has been often enunciated, but never more clearly nor succinctly than by this court in *Foley vs. Kilbourne*, 222 Fed., 761, where it is said:

“It is the established rule that the findings of the trial court in a suit in equity must be taken as *presumptively correct* and that, unless an obvious error has intervened in the application of the law or some serious or important mistake has been made in the consideration of the evidence, the findings will not be disturbed by the appellate court.”

The foregoing was a suit to set aside a patent obtained by fraud.

In *United States vs. Marshall*, 210 Fed., 595, 597, in the eighth circuit, also a suit to set aside a patent fraudulently obtained, the emphasis is placed upon the necessity that error, to be reversible, must be “manifest”, “obvious”, “palpable”, “serious”; but, in the last analysis the decisions in all of the courts and in all of the circuits amount to the same, viz., that the findings of the trial court are “presumptively correct” and will not be disturbed except upon a plain showing that they are not only against the

weight of the evidence, but that no substantial basis for their support is afforded by the evidence.

*Harrison vs. Fete*, 148 Fed., 781

*Mastin vs. Noble*, 157 Fed., 506

*State of Iowa vs. Carr*, 191 Fed., 257

*Harper vs. Taylor*, 193 Fed., 944

*DeLaval vs. Iowa Co.*, 194 Fed., 423

*Babcock vs. DeMott*, 160 Fed., 882.

But it may be contended that, in view of the fact that the testimony was taken in the instant case before an examiner, no presumptions attend the findings of the trial court and that this court is in as favorable position to pass upon the credibility of the witnesses and glean the truth in the midst of conflict as the lower court; and *The Santa Rita*, 176 Fed., 890, and *United States vs. Booth-Kelly Lumber Co.*, 203 Fed., 423, 429, will doubtless be cited in support. It is sufficient to say that in the former, an admiralty case, the holding is that, when the evidence of the principal witnesses was by written depositions, the rule that "the trial court is better able to reach a satisfactory conclusion than the appellate court \* \* \* does not apply *with the same force*." In the *Booth-Kelly Lumber Company* case the court indicates that, when the evidence is taken before an examiner and not before the trial judge, the latter's findings "are not attended with presumptions" which attach when the judge "has the opportunity to observe the demeanor of the witnesses". By the language quoted it is submitted that Judge Gilbert did not intend to say that under such circumstances

no presumption of correctness attends the findings of the trial court: for in such case the lower court would, as suggested by the eighth circuit in *United States vs. Marshall*, 210 Fed., 595, 597, be no more than "a mere conduit". As there stated, "the question is not so much one of situation to decide as of where the law places the primary determination of questions of fact. While no doubt the circumstance that the district judge personally heard the witnesses tends to strengthen the presumption in favor of his conclusion, the fact that he did not hear such witnesses, but that the proofs before him were entirely by deposition or upon examiner's report, does not destroy the presumption. Such still exists in favor of his conclusions. To hold otherwise would be in effect to make this a court of first instance. The district court is not in such matters a mere conduit. It, not this court, is the trial court. Our functions are simply to guard against manifest error on its part and this is true whether such arises upon hearing witnesses or upon reading a record."

Measured solely by relative situation, the appellate court, in cases in which the evidence is taken by an examiner, is not nearly so favorably situated as the lower court for the reason that under the new rules of practice in equity the testimony by questions and answers is not seen by the appellate court, but only a condensed statement of it in narrative form. The advantage that arises out of reading the questions and answers, especially of the cross examination, is obvious; and the wisdom of a



rule, the effect of which is to take away this advantage, would be gravely questionable unless the findings of the trial court are to be held presumptively correct and are not to be disturbed in the absence of "manifest", "obvious", "palpable" error. If the trial court is "a mere conduit" through which to transmit to the appellate court the evidence upon which a determination shall be reached, that evidence ought surely to be sent up unimpaired and undiminished so that the court may have all the benefits open to the forwarding agency. But the government does not understand that such was the decision in *The Santa Rita* or in *United States vs. Booth-Kelly, supra*, the effect of these decisions being merely to indicate that in the one case the presumption of correctness, while still obtaining, is merely not as strong as in the other.

### THE ERRORS ASSIGNED.

Assignment number one presents this question: Did the United States prior to patent investigate and ascertain the true character of the lands in suit—did the government adjudicate their non-mineral character?

Assignments numbers two and five present, in effect, the same question, viz.: Had the United States equal knowledge with appellants of the true character of the lands?

Assignments numbers three, four, six, seven, eight and nine present, in somewhat varying form, two questions, viz.:

1. Were the lands in suit at the time of the proceedings which resulted in patent *known mineral lands*?

2. Did the railroad company's acting land agent falsely and fraudulently represent to the land department of the government that he had caused the lands in suit to be carefully examined as to their mineral or agricultural character and that they were not interdicted mineral lands, but non-mineral agricultural land of the character contemplated by the grant?

It will be readily seen that the answer to the second question is largely dependent upon the solution of the first; for, if the lands were known mineral lands, it would follow that the affidavits filed by appellants were false.

Assignment number ten presents the general question of the validity of the assailed patent and its solution depends upon the answers to the particular assignments.

In the ensuing argument the questions so presented will be discussed under the following main divisions, each of which will be divided into such sub-topics as the nature and details of the evidence may require:

I. The government did not prior to patent investigate and ascertain the true character of the lands in suit and did not determine nor adjudicate them non-mineral in character.

II. The government had not prior to or at the time of patent equal knowledge with appellants of the true character of the lands in

suit and therefore had the right to and did rely on their verified proofs.

III. The lands in suit were, at the time of the proceedings resulting in patent, known mineral lands.

IV. The proofs by appellant Southern Pacific Railroad Company of the character of the lands in suit offered in connection with its selection thereof were false and were fraudulently made and were calculated and intended to and did deceive the land officers of the government.

## I.

**THE GOVERNMENT DID NOT PRIOR TO PATENT INVESTIGATE AND ASCERTAIN THE TRUE CHARACTER OF THE LANDS IN SUIT AND DID NOT DETERMINE NOR ADJUDICATE THEM NON-MINERAL IN CHARACTER.**

Upon this question Judge Bean's opinion has the following:

"At the time the selection list was first filed the lands in controversy, together with a large area of other lands, were within a previous withdrawal order of the department because of their probable oil content. At the request of the defendant company the department ordered an examination of the lands applied for by a special agent to ascertain whether they should be relieved from suspension and upon his report the suspension order was revoked as to these lands and they were subsequently patented to the defendant. The claim is made that the department, in issuing the patent, relied upon the report of its own employees as to the character of the land and not upon the affidavit accompanying the selection list. The evidence shows that the agent making the examination and report was not an oil or mineral expert and was instructed by his superior in the Land

Office that 'it would be unnecessary to go over all the lands, but to drive over part of them "as the crow flies" and to interview ranchmen, stockmen, etc., as to the location of oil wells producing oil in paying quantities' and to 'recommend that those lands be relieved from suspension on which he found no oil wells producing oil in paying quantities'; and that he acted accordingly and made no examination whereby he determined or could determine whether in fact the lands were mineral in character. In his report he said that he 'found no oil seepages, oil springs or other indications of oil or mineral of any kind that would tend in his opinion to warrant' the lands being classified as mineral in character and, therefore, recommended that they *be relieved from suspension.*

*"These proceedings were in no sense an adjudication, but a method adopted by the department for determining whether its previous order of withdrawal should be revoked and the lands opened to entry. They did not establish the non-mineral character of the lands nor relieve the company from the consequences of submitting false and misleading affidavits and proof upon which the land officers were expected to and no doubt did rely in issuing patents."*

The foregoing excerpt shows that the trial court considered the very question now raised by appellants and found against them. Unless, then, it plainly appears that in this finding there was manifest, palpable error and that there is no substantial support of it in the record, under the rule already discussed it will not be disturbed by this court. However, the government is far from being com-



pelled to fall back upon the doctrine of “presumptive correctness”, since the record abundantly shows that the finding is not only amply supported, but that it was inevitable and is inescapable.

A proper review of the pertinent facts involves consideration of the following:

(a) The withdrawal order of February 28, 1900.

(b) Filing and rejection of selection list 89.

(c) The appeal of the railroad company from the order of rejection.

(d) The railroad’s request that the lands in suit be relieved from suspension.

(e) The instructions to special agent Ryan.

(f) Special agent Ryan’s qualifications, investigation and reports.

(g) The order of the Commissioner of the General Land Office relieving the lands in suit from suspension.

(h) The effect of the foregoing proceedings.

**a. The withdrawal or suspension order of February 28, 1900.**

The so-called withdrawal of February 28, 1900, was a telegraphic order from Binger Hermann, then Commissioner of the General Land Office, to the Register and Receiver at Visalia to “suspend from disposition until further order” forty-five entire townships including the one in which are situated the lands in suit (Ex. QQQ—R. 1524). This order was, in terms, a suspension from *all forms of acquisition*.

E. C. Finney, a witness for the government, testified as to the circumstances and history of this order of suspension. At the time of testifying this witness was an assistant attorney general in the Interior Department; he had served eleven years as a clerk and examiner in the mineral division of the General Land Office, that division being known as division "N" and its correspondence exclusively bearing the letter "N"; for the three next succeeding years he had served as a member of the board of law review, reviewing letters and decisions prepared for the signature of the Commissioner; served during the year 1909 as assistant to the Secretary of the Interior; thence and until May, 1911, he was chief law officer of the reclamation service; November 1, 1911, he became an assistant attorney general in the Interior Department; during his long service he had become very familiar with the practice of the land department (R. 1581-2). With reference to Exhibit QQQ, the suspension order now under consideration, Mr. Finney stated that the effect given it in the General Land Office was *that it was a suspension from all forms of acquisition*, both mineral and non-mineral (R. 1582). It was issued in response to representations made to the General Land Office during 1899 and 1900 that, unless large areas in California were suspended from entry, agricultural patents would be obtained thereto before opportunity was afforded for ascertaining whether or not they contained oil (R. 1581-2). That this order was in force when selection list 89 was first filed is not disputed.

**b. Filing and rejection of selection List 89.**

C. W. Eberlein at the instance of E. H. Harriman, then president of the Southern Pacific Company and the Southern Pacific Railroad Company; came to San Francisco in June, 1903, to take up the matter of consolidating and reorganizing certain land grants in which appellants were interested (R. 1037). After his arrival Mr. Julius Kruttschnitt, vice-president and general manager of the Southern Pacific Company, asked and insisted that he accept the position of acting land agent of the Southern Pacific Railroad Company. He did so and entered upon the discharge of the duties of that office August 3, 1903 (R. 1037), which involved "full charge and control of all the granted lands of the company" (R. 1039-40).

November 14, 1903, Eberlein filed in the land office at Visalia the original selection list number 89, designated here as "original" for the reason that two lists were filed before patent and bore the same number, 89 (Ex. 12-M). This so-called list is labeled "Lands selected by the Southern Pacific Railroad Company, Indemnity Limits, Main Line," and is dated November 7, 1903. It was accompanied by the non-mineral affidavits set out in full on page 3 of this brief.

November 18, 1903, this selection list was rejected by the Register and Receiver on the ground that the lands applied for were embraced in the Commissioner's order of suspension of February 28, 1900 (R. 3756-7). That this action was in conformity with

the rules of the department in like cases appears and is stated and admitted by the Washington attorney of appellants, D. A. Chambers, in a letter from him December 16, 1903, to W. F. Herrin, general counsel of the Southern Pacific Company and Southern Pacific Railroad Company (R. 1483-4.) That a patent would not issue in the face of the outstanding suspension was known to the railroad, as is shown by the letter of December 9, 1903, from W. F. Herrin, general counsel, to Eberlein, the acting land agent, which is quoted by Eberlein in his letter of December 10, 1903, to Chambers (R. 1577). In it Herrin is quoted as saying: "The best course, it seems to me, was to accompany the selection list with affidavits setting forth that the lands are vacant and unappropriated non-mineral lands and *asking that the order of suspension be released*" (R. 1578).

**c. Appeal of the railroad from the order of rejection.**

From the rejection of list 89 the railroad appealed December 11, 1903, to the Commissioner of the General Land Office and the appeal, together with the papers in the case, was forwarded the same day to Washington by Geo. W. Stewart, the Register (Ex. 12-N-R. 3767).

**d. The railroad's request that the lands be relieved from suspension.**

As already noted, an appeal was taken from the order of rejection and was forwarded to Washington December 11, 1903. This appeal was taken by the



law department of the railroad by W. F. Herrin, general counsel of the Southern Pacific Company and Southern Pacific Railroad Company, and not by the land department or Eberlein, the acting land agent (R. 1577-8). It would seem that the papers were prepared by Wm. Singer, an eminent attorney connected with the railroad company. The specific purpose of this appeal does not appear nor does it appear that it ever came on for hearing before the Commissioner. Such action as was taken with reference to it will be discussed later.

A copy of the appeal was sent by Herrin to Chambers, the Washington attorney, December 9, 1903, two days before the appeal was filed in the local land office at Visalia (R. 1577). Replying December 16, 1903, to the letter enclosing such copy, Chambers called the attention of Herrin to the fact that an effort had been previously made to have the late Commissioner of the General Land Office, Binger Hermann, revoke the outstanding suspension order of February 28, 1900, but that "the best he would do was to direct his special agents to examine and report on all lands within railroad limits in southern California" (R. 1483).

Prior to the filing and forwarding of the appeal, viz., November 30, 1903, Chambers had addressed a letter to the Commissioner in which, referring to list 89 and the lands described in it, he called attention to the fact that the lands had been suspended February 28, 1900, but that "an examination of the tract books

in your office fails to show the entry of a single acre of these lands under the act allowing entry of lands valuable for oil"; and further writing as follows:

"Upon my request of October 7, 1903, your office wrote me October 23d (Quasi contest 1997 and 1998) 'that an investigation' of other lands described (among them the SW $\frac{1}{4}$  Sec. 1 of said T. 30 S., R. 23 E.) 'will be made by an agent of the office and upon receipt of his report appropriate action will be taken upon the application of the company to select same'. I, therefore, respectfully ask that a special agent be instructed to *at once* examine said lands and report thereon to your office" (Ex. VVV—R. 1545).

On the 7th day of October, 1903, Chambers had made similar representations concerning other lands which the railroad company was attempting to select and which were in the suspended area and had asked that a special agent be instructed to report on them; so that *the suggestion of a report by a special agent originated with Chambers and not with the Commissioner* (Ex. SSS; R. 1539-40).

When these letters were received in the General Land Office they were referred to the witness Finney who testified that, upon receipt of them, particularly that of November 30, 1903, having prepared for the signature of the Commissioner a reply to that of October 7th, he went to the Chief of Division P, in charge of the field force, and "asked for the name and address of a special agent to make a field investigation of the lands included in the order of suspension in California with a view to obtaining informa-

tion upon which the General Land Office might determine the advisability of either *continuing or revoking the suspension order*"; the only intention at that time being to determine whether the suspension should be lifted or not; "it was my purpose, if the special report so warranted, to prepare for the approval of the Commissioner a letter restoring the lands to general and appropriate disposition and entry, selection and filing under the law applicable to them; if the report showed good reason for continuing the suspension order, it was my purpose to prepare letters denying the request of the attorney for the railroad company and advising the Register and Receiver that the suspension would be continued" (R. 1582-3).

December 16, 1903, in a letter to W. F. Herrin, general counsel of the Southern Pacific Company and Southern Pacific Railroad Company, D. A. Chambers, the Washington attorney, referring to the suspension of February 28, 1900, wrote that the rejection by the Register and Receiver of list 89 was in conformity with the rulings of the Department in like cases. He further wrote that he had endeavored to secure from Commissioner Binger Hermann the revocation of the order of suspension, but that "the best he would do was to direct his special agents to examine and report on all lands within railroad limits in southern California." He further stated that he had never been able to learn that any report was ever made by special agents. With specific reference to list 89 he wrote: "As to the lands in

this list 89, on the 30th ult. *I requested* the Commissioner to have an investigation of them made immediately by a special agent and on the 10th inst. he advised me that a special agent had been instructed to examine and report on them.” *It did not seem advisable to him “to take steps to get a hearing”* (R. 1483).

December 10, 1903, Chambers wrote Eberlein that he had requested the Commissioner to “have an investigation made by a special agent of his office without delay of the lands named in the application list”; and further: “I am now advised by this letter of the tenth instant that he has directed such examination to be made. I presume that the special agent is Mr. Ryan, but I am not advised positively about this.” (R. 1482.)

January 13, 1904, Chambers wrote Eberlein a letter in which he states with reference to his action in ordering that a report be made on the lands in list 89:

“But inasmuch as patent cannot issue until the Commissioner *relieves them of suspension*, it seems to me that what has been done here will hasten the adjudication of the lands as non-mineral and their patenting to the company. That was my object.” (R. 1486, 1488.)

In the same letter Chambers writes that he has been confidentially allowed to read the Commissioner’s letter of December 10, 1903, to Special Agent Ryan and that it “suggests that he now report



whether there is any necessity for the *continuance of the suspension* of any of the lands in three districts." (R. 1488.)

e. Instructions to Special Agent Ryan.

Exhibit WWW (R. 1547-8) is the Acting Commissioner's letter of instructions to special agent Ryan. Because of its importance it is here set out in full and follows:

DEPARTMENT OF THE INTERIOR  
General Land Office

N. Washington, D. C. H. G. P.  
E. C. F. December 10, 1903.

Address only the Commissioner  
of the General Land Office.

Mr. E. C. Ryan,  
Special Agent, General Land Office,  
Los Angeles, California.

Sir:

By letter of this office dated October 23, 1903, in case of *ex parte* Southern Pacific Railroad Company, Quasi-Contest 1997 and 1998, you were directed to proceed to and examine the SE $\frac{1}{4}$  Sec. 23; SW $\frac{1}{4}$  Sec. 27; T. 32 S., R. 25 E.; and the SW $\frac{1}{4}$  Sec. 1, T. 30 S., R. 23 E., said tracts having been applied for by the railroad company and to submit report to this office stating whether or not in your opinion same should be *relieved from the suspension* placed thereon by telegrams "P" of February 21st and 28th, 1900.

The Southern Pacific Railroad Company has now requested that the following lands be also examined *in order that same may be relieved from suspension* and made subject to selection by the company, being within the indemnity

limits of its grant, if such examination discloses that same are agricultural in character. It is stated that nearly four years have elapsed since the order of suspension and that no mineral entries have been made for any of said lands. The lands referred to are described as follows: All of section 15; NE $\frac{1}{4}$  and SW $\frac{1}{2}$  Sec. 17; NE $\frac{1}{4}$  and SW $\frac{1}{2}$  Sec. 19; all of sections 21; 23; 25; 27; 29; 33, and 35, T. 30 S., R. 23., M. D. M.

You are accordingly directed, when you make examination of the lands first described, to also examine the tracts just enumerated and to promptly thereafter submit report as to *whether or not in your opinion same should be relieved from suspension.*

This office has no available force from which to assign you assistance at the present time. With this condition of affairs in view, you will make report based upon the examinations heretofore made, your knowledge of the lands remaining to be examined, and familiarity with the country generally, *as to whether in your opinion there is any necessity for the continuance of the suspension of the lands in the Visalia, San Francisco and Los Angeles land districts suspended by this office in 1900, and not reported upon, a list of which you have.*

Very respectfully,

J. H. FIMPLE,  
Acting Commissioner.

WPW 7  
(R. 1547-8.)

The "letter of this office dated October 23, 1903," referred to in the foregoing reads as follows (Ex. UUU; R. 1542-3):

N. DEPARTMENT OF THE INTERIOR, HOC  
ECF General Land Office HGP

Address only the Commissioner  
of the General Land Office.

Washington, D. C.  
October 23, 1903.

Southern Pacific R. R. Co.,  
*Ex parte.*

Quasi contests 1997 & 1998.

Mr. E. C. Ryan,  
Special Agent, General Land Office,  
Los Angeles, California.

Dear Sir:

The Southern Pacific Railroad Company has filed application in the Visalia land office to select the SE $\frac{1}{4}$  Sec. 23, the SW $\frac{1}{4}$  Sec. 25 and the SW $\frac{1}{4}$  Sec. 27, T. 32 S., R. 25 E., M. D. M., and the SW $\frac{1}{4}$  Sec. 1, T. 30 S., R. 23 E., M. D. M. The lands in the above named townships were suspended from disposition under the agricultural land laws on account of their alleged mineral (oil) character by telegrams "P" of February 21st and 28, 1900. It is alleged by the railroad company that the tracts above described are in fact non-mineral in character. *You are therefore directed, in the regular order of business, to proceed to and examine the lands in question and thereafter submit report to this office stating whether or not in your opinion the same should be relieved from suspension.* When making report please refer to Quasi contests 1997 and 1998.

Very respectfully,

J. H. FIMPLE,  
Assistant Commissioner.

WPW 7

It will be observed that these letters were written December 10, 1903, and October 23, 1903, respect-

ively, and therefore before the receipt in Washington of the appeal which, as heretofore noted, was filed at Visalia December 9th and forwarded the same day to the General Land Office.

That the railroad's effort and request were to have the lands "*relieved from the suspension placed thereon by telegram 'P' of February 21 and 28, 1900*", and that *Ryan was directed to "submit report as to whether or not in your opinion same should be relieved from suspension"* are the pertinent provisions of his instructions. *This was the end and purpose in view—what was sought by the railroad and ordered by the Commissioner.*

The manner and method to be employed and followed are set out plainly in the last paragraph of this letter and demonstrate the singleness of purpose and object already shown.

The foregoing letters constitute the written instructions to Ryan. He also had verbal instructions which were given by one Pollock, who was then chief of the field service. Ryan testified as a witness for the government (R. 1598) and stated in detail these verbal instructions which he said were given him about the last of September, 1903, prior to his written instructions. Pollock told him that the lands in suit and other lands upon which he was directed to report had been suspended about four years and, in answer to the protest of the witness that it would be impossible for him to go over all of the lands without a camp outfit, stated that *he could not fur-*



*nish him with the outfit, but that it was not necessary for the witness to go over all the lands; that he could drive over part of them "just as the crow flies" and interview ranchmen and stockmen as to the location of oil wells producing oil in paying quantities. Pollock then instructed Ryan to recommend that lands on which he did not find wells producing oil in paying quantities be relieved from suspension (R. 1597-8). His instructions were to examine all of the lands under suspension which included about twenty-five townships (R. 1598).*

Ryan had no instructions, either oral or written, to determine specifically the mineral or non-mineral character of the lands upon which he was directed to report (R. 1601). *He understood definitely from Pollock that the only thing on which he was to report was whether or not he found oil in paying quantities and stated that that was all he was looking for (R. 1606).*

E. C. Finney, an assistant attorney general in the Interior Department, who in one capacity or another had been connected with that department more than fifteen years, testified that prior to the request by the railroad for a report on those lands there was a feeling in the department that many of these lands which had been under suspension for some time should be relieved unless there was real showing in the way of exploration; that he himself had noted several instances of the rejection by the Register and Receiver of railroad selections and applications for

homestead entries and thought that, if the agents' reports showed no good reason to the contrary, the lands should be restored to general disposition (R. 1591). He also stated that the order of suspension of February 28, 1900, *covered all forms of disposition and that, during its pendency, no entry or selection could be allowed* (R. 1591). Accordingly, it was the purpose of the witness, in preparing the letter of instructions to Ryan, and of the Commissioner, in approving and signing it, to obtain general information derived from a general examination of the lands and from whatever knowledge Ryan might be able to acquire or had already acquired (R. 1586). The Commissioner's purpose was to acquire general information to guide him in restoring the lands to general disposition so that desert lands claimants, forest lieu selectors, mineral claimants or any other qualified citizens might apply to select or enter the lands under the applicable laws upon submitting the proofs of the character required by the law and regulations; that there was no attempt to adjudicate the character of any particular tract of land in any of the letters which he prepared or with which he had to deal; that consequently *there was no effort to send a person with special scientific qualifications to determine the character of the lands*; and, in fine, that *the revocation of a suspension was regarded and treated as a mere restoration of the lands to their former status*. (R. 1587).

Finney was the official to whom was referred for appropriate action the letter of November 30, 1903,

of Chambers, the Washington attorney of the Southern Pacific Railroad Company (Ex. VVV—R. 1544-5), to the Commissioner asking that “a special agent be instructed to at once examine said lands and report thereon to your office.” He testified that, when, as already set out, he sought the name and address of a special agent to make a full investigation of the lands included in the order of suspension, he did so with a view of obtaining information upon which the General Land Office might determine the advisability of either continuing or revoking the orders in question.

The letter of instructions of December 10, 1903, from the Acting Commissioner to Ryan (Ex. WWW—R. 1547) was prepared by Finney and bears his initials—“E. C. F.” (R. 1586.) It is for this reason that so much of the testimony of this witness has been set out, bearing, as it does, directly upon the question of the written instructions by which Ryan was governed.

**f. Special agent Ryan's qualifications, investigations and report.**

**1. His qualifications:**

Ryan was a special agent of the General Land Office stationed at Los Angeles. *He was neither a geologist nor mineralogist* (R. 1597) *and himself testified that he would not have known a gas blow-out if he had seen it* (R. 1605). He had gone to Los Angeles in October, 1899. He first went into the oil fields at Bakersfield probably in 1900 or 1901. Afterwards he was at McKittrick for a while, “pass-

ing in and out." He was there probably twice or oftener in 1903 "to look over the suspended lands." (R. 1601.)

The foregoing is the "short and simple annals" of the special agent's qualifications as disclosed by the record and as brought out both on direct and cross-examinations. It is manifest that there can be predicated upon them no special fitness to pass upon the difficult problem of determining the mineral character of land and that the land department of the government, in sending him into the oil fields, did not expect to be informed by him as to whether the lands upon which he was to report were actually oil lands or chiefly valuable for agriculture. Indeed, there is direct testimony that "there was no attempt to send a person with special qualifications to determine the character of the lands." (Finney—R. 1587.)

## 2. His investigation:

Only two witnesses testified as to what Ryan actually did—he himself and D. W. Maddux, a witness for appellants, who drove the team in which Ryan made his trips of investigation of the presence of "oil wells producing oil in paying quantities."

From Ryan's testimony the following appears:

The examination was begun in January, 1904. Ryan and Maddux made McKittrick headquarters and Ryan was engaged about three days in the examination of the Elk Hills (R. 1602). He first went



to a point where he could look over the lands and looked around for oil wells, but did not see any. (It will not be disputed that, while an oil well itself cannot be seen afar, the derrick with which every producing oil well in California is crowned is of commanding height and size and, when there is no obstruction, can be seen for miles.) He did not go over every section of land—only four or five of them (R. 1598). The land was very rough and it was physically impossible for him to get over all of it. He did not examine the land with reference to oil seepages or oil sands. He looked for them along the road which he followed, but found none. There might have been some on the lands at places which he did not see; but he was not instructed to go over every legal subdivision (R. 1599). He probably got over half of the townships in the twenty-five upon which he reported and interviewed people relative to the oil wells that might be there (R. 1599). According to instructions he interviewed stockmen, cattlemen and anyone whom he chanced to meet along the line as to both the lands which he traversed and those upon which he did not go (R. 1600-1). *His examination was made for the purpose of ascertaining if there were oil wells* and, finding none, he reported according to instructions (R. 1603). He did not go upon much of the land in the Elk Hills; but, finally coming to the commanding eminence already mentioned, he could see no development. He made no inquiries concerning the Elk Hills, though Maddux may have told him something about them (R. 1604). (It will not be dis-

puted that at the time in question there was no development in the Elk Hills.) He made no extensive examination of the lands and did not go on much of it—just looked along the road, “*his criterion being oil in paying quantities*” (R. 1605).

From Maddux’ testimony the following appears:

The witness accompanied Ryan as a sort of pilot and his recollection was that they were in the Elk Hills three or four days (R. 1972). Ryan did not tell him that he was looking for oil derricks and the only information that he gave was that his business was to inspect the odd-numbered or railroad sections. Witness observed no mining work in progress in the Elk Hills (R. 1973), but saw many location notices.

If there is any real conflict in the testimony of these witnesses as to the number of days spent in the Elk Hills, it is clearly resolved in favor of the statement of Ryan in his letter of January 22, 1904, in which, reporting to the Commissioner, he states that his examination covered five days, January 10, 11, 12, 13 and 14. Maddux himself on cross-examination admitted that, if the entire examination covered but five days, only two of them were spent in the Elk Hills (R. 1972-3), two days being consumed in journeying to and from Mari-copa. Manifestly, Ryan’s memory of the period of the examination during the very month in which it was made was more reliable than Maddux’ could possibly have been eight years afterwards; and there is no suggestion that Ryan at the time of making

his report had reason to understate the duration of his work.

### 3. His report:

January 22, 1904, special agent Ryan transmitted a written report to the Commissioner of the General Land Office concerning the lands described in the letters of the Acting Commissioner already set out. That report is Exhibit XXX (R. 1550) and follows:

88085

DEPARTMENT OF THE INTERIOR  
General Land Office

Los Angeles, Cal., January 22, 1904.

Hon. Commissioner,  
General Land Office,  
Washington, D. C.

Sir:

By your letter ("N" E. C. F.) of October 23, 1903, in case of *ex parte* Southern Pacific Railroad Company, Quasi contests 1997 and 1998, I was directed to proceed to and examine the SE $\frac{1}{4}$  Sec. 23; SW $\frac{1}{4}$  Sec. 25; SW $\frac{1}{4}$  Sec. 27, Township 32 South, Range 25 E., M. D. M., and the SW $\frac{1}{4}$  Section 1, Township 30 S., Range 23 E., M. D. M., said tracts having been applied for by the railroad company, and to submit report stating whether or not in my opinion same should be relieved from the suspension placed thereon by telegrams "P" of February 21st and 28, 1900.

By your letter ("N" E. C. F.) of December 10, 1903, I was directed to also examine Section 15; NE $\frac{1}{4}$  and S $\frac{1}{2}$  Section 17; NE $\frac{1}{4}$  and S $\frac{1}{2}$  Section 19; Sections 21, 23, 25, 27, 29, 33 and 35, Township 30 S., Range 23 E., M. D. M., and to submit report as to whether or not in my

opinion said lands should be relieved from suspension.

I have the honor to report that on January 10th, 11th, 12th, 13th and 14th, 1904, I made a careful examination of the lands in question and found no oil seepages, oil springs, surface or other indications of oil or minerals of any kind that would tend, in my opinion, to warrant said lands being classed as mineral in character, and *I respectfully recommend that they be relieved from suspension.*

Very respectfully,

E. C. Ryan,

Special Agent, General Land Office.

(R.1549-50-51.)

It is to be noted that this report concludes with a recommendation in exact accord with the request of the railroad and the instructions of the Acting Commissioner. The request of Chambers had been that the lands be "*relieved of suspension.*" The instructions of the Acting Commissioner had been that Ryan recommend whether or not they should be "*relieved from suspension.*" Now comes the report recommending that they be *relieved from suspension.*

The report already set out covers the lands in suit and a quarter section in each of Sections 23, 25 and 27 of T. 32 S., R. 25 E., distant therefrom ten or twelve miles.

In a general report made March 22, 1904, Ryan included these lands in suit along with twenty-four other townships covered by the outstanding order of suspension. This report is Exhibit 4-B and is found



at pages 1559-1567 of the record. In this report he says with reference to the township in which the lands in suit lie:

“No wells have been bored for oil and in my opinion all the lands in this township should be relieved from further suspension.” (R. 1564.)

Thus it is seen that he was following the “criterion” which he says was prescribed by his chief, Pollock.

As corroborative of his testimony concerning this matter of “criterion”—that is, that he should recommend relief from suspension where he found no “oil wells producing oil in paying quantities”—and of his faithfulness in observing it, this general report shows that *in several instances in which he found wells which had yielded oil he recommended that the lands be relieved from further suspension.* The report demonstrates that he was literally governed in his recommendations by the instructions that his “*criterion*” *should be the presence or absence of oil wells actually producing oil in commercial quantities.* With reference to townships 31-22, 31-23, 31-24, 31-25, 32-20, 32-22, 32-25, South, Ranges East, M. D. B. & M., and townships 11-28 and 12-28 North, Ranges East, S. B. B. & M., finding or learning of no wells on them, he recommended, as in the case of township 30 South, Range 23 East, that they be relieved from suspension. In other instances, in townships in which upon certain sections he found or learned of commercial wells, he

recommended that all sections upon which there were no wells be freed of the embargo. It is manifest that he was guided, as he stated in his testimony, by the sole and simple test of the absence or presence of commercially producing wells. With reference to townships 29-30 and 29-21 South, Ranges East, M. D. B. & M., he recommended, although he actually found oil wells thereupon, that they be relieved for the reason that the wells were not producing in paying quantities.

Explaining his recommendations and justifying his action, Ryan stated that he was merely following instructions (R. 1600). As to half of the townships his recommendations were based upon hearsay evidence—why not, he asked, since they had been originally suspended upon such evidence?

On cross-examination Ryan, with reference to township 30-23, said:

“My examination was made for the purpose of ascertaining if there were any oil wells on there; and I found no oil wells and hence I made that report. I made that report in accordance with instructions. I did not say that there were no oil seepages. When I said that I found no oil seepages, I meant that as a fact. And I found no surface or other indications of oil or minerals of any kind. That is what I said in my report, I believe.” (R. 1602-3.)

On re-direct he said:

“I just looked along the road, as my instructions did not require me to make a thorough

and minute investigation of the land. \* \* \* The language used by me in these reports, viz., 'oil seepages,' 'oil wells,' 'oil springs,' and 'surface indications which would tend in my opinion to warrant lands being classified or not classified as mineral lands' were a kind of stereotyped form that I used. I find it running through all my reports." (R. 1605-6.)

g. The order of the Commissioner of the General Land Office relieving the lands in suit from suspension.

Exhibit ZZZ is the letter of the Acting Commissioner relieving the lands in suit and others from suspension. It is found at pages 1555 and 1556 of the record and follows:

N.

W. O. C.

E. C. F.

H. G. P.

DEPARTMENT OF THE INTERIOR  
General Land Office

Address only the Commissioner of the General  
Land Office.

Washington, D. C.,  
February 11, 1904.

Register and Receiver,  
Visalia, California.

Sirs:

By telegrams "P" of February 21 and 28, 1900, townships 30 S., Range 23 E., and 32 S., R. 25 E., M. D. M., were suspended from disposition under the agricultural land laws upon allegations that same contained deposits of mineral (oil).

I am now in receipt of a report from a special agent of this office who has examined the SW $\frac{1}{4}$  Section 1; Section 15; NE $\frac{1}{4}$  and S $\frac{1}{2}$  Sec. 17; NE $\frac{1}{4}$  and S $\frac{1}{2}$  Sec. 19; Sections 21, 23, 25, 27, 33, 35, Township 30 S., R. 23 E.; the SE $\frac{1}{4}$  Sec. 23, SW $\frac{1}{4}$  Sec. 25, and the SW $\frac{1}{4}$  Sec. 27, Town-

ship 32 S., R. 25 E., M. D. M., and who states that a careful examination thereof failed to disclose any oil seepages, oil springs, surface or other indications of oil or minerals of any kind that would tend to warrant the lands being classed as mineral. He recommends that same be relieved from suspension. The statements made in the special agent's report are not controverted by the records of this office and it would appear that during the period of nearly four years which has elapsed since said suspension, any persons interested in the mineral development of the lands have had ample opportunity to explore and develop the same.

In view of these facts, it appearing that no oil or mineral of any kind has been discovered upon the lands in question it is believed that *no good reason exists for the further suspension thereof*. Accordingly, the lands hereinabove described are hereby relieved from suspension.

Make the proper notations upon your records.

Very respectfully,

J. H. Fimple,  
Assistant Commissioner.

IL

It is noteworthy that this letter was prepared by the witness E. C. Finney, whose initials appear at the head and who testified to its purpose and effect.

#### **h. The effect of the foregoing proceedings.**

A brief review at this point may not be illtimed.

The railroad company sought patent to the lands in suit. It filed its selection list. This was summarily rejected by the local land office for the reason that the lands were under suspension and upon that ground alone. The railroad had pre-



viously sought from Commissioner Hermann a revocation of the suspension, but had failed to secure it. The railroad appealed, but, before it did so, its Washington attorney had asked that a special agent make a report in order that a basis for the action which it sought might be had. The Commissioner ordered a special agent to make an examination and report and instructed him to make a recommendation as to whether the lands should be relieved from suspension. The special agent made his recommendation that the lands be relieved and the Commissioner so ordered.

At no point in the proceedings under review does it appear that an effort was made to ascertain the true character of the lands. The railroad did not ask it—the special agent was not instructed to ascertain it—he could not have ascertained it because of his known and self-admitted lack of qualifications—he made no report upon their true character—the Commissioner made no finding as to it.

The outstanding order of suspension was the lion in the railroad's path. To obtain riddance of it was the direct and only purpose. As long as this order remained in force the lands were segregated from the public domain and were not liable to entry or location. While the contention of counsel for appellants that the suspension order related only to non-mineral entries is challenged by the government, which urges that it barred as well mineral locations, it is admitted by all that, as long as it

continued unrevoked, *it absolutely withdrew the lands from homestead entries, desert land entries, etc., and railroad selection.*

The action of the railroad in seeking a revocation of the suspension was not in the nature of a proceeding in aid of its appeal from the action of the local land officers in rejecting selection list 89, that action having, as already shown, antedated the appeal. What it sought was such an order as would give its selection a standing before the local land officers. It was not in terms seeking a classification of the lands as non-mineral, though the letter of Chambers of January 13, 1904, to Eberlein hints that there might have been such a hidden object (R. 1486, 1487).

The sole question before the General Land Office was: Shall the lands be relieved from suspension and restored to their original status as part of the public domain and, as such, open to all forms of entry, mineral and non-mineral, according as their true character might turn out to be?

Nothing but the order of suspension of February 28, 1900, took the lands in suit out of the category of public lands open to such forms of acquisition as might be found appropriate. The removal of the suspension merely restored the *status quo*. This reasoning is so sound and the conclusion so inevitable as not to require elaboration or argument. It was certainly the opinion entertained by the General Land Office (R. 1587).

And yet it is now urged that by the proceedings under review the government investigated and ascertained the true character of the lands in suit and, having done so, may not now be heard to say that it was deceived by the representations of appellants, however false and fraudulent they may have been. The railroad did not ask for a classification of the lands or an ascertainment of their character; the Commissioner did not order a classification or an ascertainment; the special agent did not attempt either; and all of the proceedings resulted only in relief from the effect of the suspension. Suspension from what? From entry, location, selection! The *status quo* was restored. Had there been no antecedent suspension, appellants would not contend that the railroad's non-mineral affidavits were merely pro forma and not entitled to be relied upon and not relied upon. And yet, although it is manifest that the proceedings in question had only the effect of doing away with the suspension—making it non-existent—appellants gravely contend that the removal of the only obstacle to the status quo was more than it purported to be, more than they asked for, more than the Commissioner ordered—in fine, that it was a finding or adjudication that the lands which they coveted were non-mineral and of the character contemplated by their grant.

If any weight were to be given to the circumstance that in this report Ryan stated that he had made a careful examination and had found no surface indications that would warrant the classifi-

cation of the lands as mineral lands, it is met by two considerations: first, that he was not chosen because of his qualifications—he was neither a mineralogist nor geologist nor what is known as a practical oil man and, by his own admission, would not have known a gas blow-out if he had seen one—to pass upon the character of the lands; second, that his instructions defined his duty, which was limited to recommending whether the suspension should be continued or removed, so that, even if he had undertaken to ascertain the true character of and classify the lands, he would have been beyond the scope of his authority, without the course of his employment, and his action in so attempting or doing would have been without force or effect. Authorities need not be cited to support this proposition.

The contention of appellants lacks even the merit of novelty. In many, if not most, of the suits brought by the United States to set aside fraudulent patents it has been urged that the government ought not to prevail because of knowledge possessed by it based upon some alleged investigation made through its agents or obtained at a hearing or otherwise. It would be difficult to determine which has been the more popular with defendants in such cases, the contention just mentioned or declamation with respect to the dignity of a patent, the solemnity of its import and the convincing, overwhelming character of the testimony necessary to effect its cancellation. It will suffice to examine a few of



the cases setting up the defense of direct or imputed knowledge.

*United States vs. Booth-Kelly Lumber Co. et al*, 203 Fed. 243, decided in this court February 24, 1913, was a suit to set aside patents under the Timber and Stone Act on the ground that the initial application of the individual patentees had been fraudulently made by them for the use and benefit of the corporate defendant. In the answer of the Lumber Company there was this allegation:

“That this defendant is informed and believes and therefore alleges that, after the said entries mentioned in said bill were made by said several entrymen, charges were made and filed with the complainant’s officials in the Interior Department, whose duty it was to investigate and determine the same, that said entries were fraudulent in character and were made for the benefit of this defendant and that said charges were fully investigated by the Interior Department for the purpose of ascertaining the truth or falsity of said charges and to determine whether patents should be issued upon said entries or whether the same should be canceled and that such proceedings were had in said matters that said several entries were fully investigated by complainant’s officials charged with that duty and testimony and affidavits were taken upon said investigation and the complainant and said entrymen were duly represented at said hearing and investigation and that, upon a full investigation and hearing upon said charges, and with full knowledge of all the facts, it was found and determined by the said officials that said entries were not fraudulent and that

the irregularities in said entries, if any, were not of sufficient gravity to require or justify the cancellation of said entries and ordered that patents issue upon said entries for said land and that patents were thereupon issued therefor, as alleged in said bill of complaint."

The defense thus raised was not, as will appear from a careful reading of the opinion by Judge Gilbert, considered of sufficient importance to be even noticed by the Court which reversed the decree of the lower court and ordered the fraudulent patents annulled and cancelled.

In the case under review it will be observed that the allegations of the defense were more far-reaching than those of appellants in the instant case. Here it is merely that the government made an investigation—there, that there was a hearing at which all parties were represented and, indeed, what amounted to a trial and was urged as an adjudication of the very question presented in the appeal.

*Washington Securities Co. vs. United States*, 234 U. S. 76; 58 L. Ed., 1220, was a suit in equity to cancel four patents issued under the commutation provision of the homestead law. The bill charged that the patents were fraudulently procured by falsely representing to the land officers that the lands were agricultural in character and therefore subject to homestead entry, when in truth they were at the time known to be valuable coal lands. Among other things, it was contended that the proceedings resulting in the patents were not *ex parte*,

but adversary; that the land officers found the land to be agricultural in character and that this finding was conclusive upon the government. (This is the very contention made in the instant case and it cannot be distinguished from the case under review on the ground that in the one there was a so-called field investigation, whereas in the other the investigation was confined to the quasi-judicial tribunal, the local land office. If an investigation by the deciding tribunal is not binding, *a fortiori* an investigation by one which has nothing to do with the decision is even less so.) Upon the contention so raised in the Washington Securities case the Supreme Court, speaking through Mr. Justice Van Devanter, says:

“No doubt those officers found from the proof submitted to them that the lands were agricultural and not coal lands, but the proceedings were not adversary in any true sense of the term. The applications and proofs of the entrymen were entirely *ex parte*. The government was not called upon to make any adverse showing, no issue was framed, no hearing was had and no one represented the government save in the sense that the land officers did so. As this court has often held, the finding of the land officers in such a proceeding, although not open to collateral attack, is not conclusive against the government when it seeks to cancel the resulting patent upon the ground that it was obtained by means of false and fraudulent proofs. *United States vs. Minor*, 114 U. S., 233; 29 L. Ed., 110; *J. J. McCaskill Co. vs. U. S.*, 216 U. S. 504, 509; 54 L. Ed., 590, 594, and cases cited. In such a suit the action of the land officers is given appropriate effect by treating it as pre-

sumptively right and as requiring the government to carry the burden of proving the fraud by that class of evidence which commands respect and that amount of it which produces conviction. *Diamond Coal & Coke Co. vs. United States* 233 U. S. 236, 239."

The quoted language fits the instant case as perfectly as if written expressly for it. Here "the application and proofs were strictly *ex parte*". Here "the government was not called upon to make any adverse showing, no issue was framed, no hearing was had and no one represented the government save in the sense that the land officers did so."

Appellants would, upon the fact that the Commissioner in his letter, Exhibit 12-O (R. 3834-5), refers to this matter as a *quasi-contest*, import into it the character of a real contest. This would have the effect of changing the meaning of the words and would destroy the very distinction entering into the words employed by the Commissioner. Furthermore, if the Commissioner had used the very word "contest" itself without the attached word of qualification, it would matter nothing, since the question is not what he called it, but what it really was.

Again, it is to be remembered that the original request that the lands be "relieved of suspension" and the immediate request upon which Ryan was instructed antedated the appeal from the rejection by the Register and Receiver at Visalia; from which it follows that *there was no proceeding of any character before the Commissioner*, to say nothing of a



contest. It all reverts to this: that there had been a suspension from disposition of lands including those which the railroad then desired to select—so long as this suspension was in force there could be no selection—and the railroad sought to get the suspension out of the way and, accordingly, before there had been any sort of action in its attempted selection, appealed to the Commissioner for an order of revocation. The instructions to the special agent, his recommendation that the suspension be revoked and the favorable action thereupon by the Commissioner, all at the request of the railroad, are now sought by appellants to be tortured and dignified into a contest. The mere statement of the facts is a complete refutation of their contention that there was a contest, that there was a determination by the government of the true character of the lands in suit and that the government is now estopped to deny the truth of false and fraudulent proofs.

In *United States vs. Minor*, 114 U. S. 377; 29 L. Ed., 110, it is plainly held that the doctrine of the conclusiveness of judgments and decrees of court as between those who are parties to the litigation is not applicable to the United States in regard to proceedings before its land officers in granting patents to the public lands; that, when it is said that in some cases the land department exercises functions in their nature judicial, it has reference to cases in which individuals have, as between themselves, contested the right to a patent before that department, the decision of which as to the facts before it is held

to be conclusive between such parties; but that fraud upon that department has been always held to be subject to remedy in equity and that, when there has been no contest and the claimant proceeds without opposition in his *ex parte* proof, it is especially necessary that equity afford the government a remedy if those proofs are founded in fraud. The contest that furnishes the basis of conclusiveness is clearly the contest between individual claimants. Such was the situation in *Tulare Oil & Mining Co. vs. Southern Pacific Railroad Co.*, 29 L. D. 269, a case strongly relied on by counsel for appellants upon the argument below. It was on its face an actual contest between the parties to the litigation.

In the Minor case, *supra*, the reasons why the government in this class of cases should not be held to, the same diligence in guarding against fraud as a private owner of real estate, founded upon the vast extent of the public domain and the paucity of land officers, are convincingly set out. This is also shown in the fact that in more than nine cases out of ten the applicant "has it all his own way"; he makes his own statement and produces his own affidavits. "If these affidavits meet the requirements of the law, the claimant succeeds and what is required is so well known that it is reduced to a formula. It is not possible for the officers of the government, except in a few rare instances, to know anything of the truth or falsehood of these statements. In the cases where there is no contesting claimant there is no adversary proceeding whatever. The United

States is passive; it opposes no resistance to the establishment of the claim and makes no issue on the statement of the claimant." These quoted words from the Minor case are aptly descriptive of the facts of the instant case and the principles underlying them are destructive of the contentions of appellants.

Many other cases might be cited and reviewed; but those above referred to support fully the position of the government that nothing was done, no proceedings were had, in the land department in connection with the patent here under attack that stands in the way of the equitable remedy of cancellation now invoked.

The only person connected in any capacity with the government who appears upon this record even to have seen the lands in suit is special agent Ryan. It is manifest that he was neither instructed to make nor made any examination or investigation of them for the purpose of ascertaining whether they were mineral or non-mineral in character. The substance and extent of his report was *that he saw no superficial evidence of their mineral character*. It is also affirmatively shown that his lack of fitness to pass upon the character of land was well known both to the land department and to himself. To seriously contend that upon such a record there is any evidence to sustain the proposition that the government actually for itself and by its own processes ascertained as a fact that the lands in suit were non-

mineral would seem to be put forward, it is respectfully submitted, only for the purpose of multiplying the errors assigned and to distract attention from the plenary evidence of the false and fraudulent character of the proofs offered by the railroad in support of its application for patent to the lands in suit.

Since there was no investigation nor ascertainment by the government of the true character of the lands in suit, *a fortiori* there was no determination nor adjudication of their non-mineral character. As shown by the cited cases, there is no such adjudication save in cases, like the Tulare Oil & Mining Co. case, *supra*, where there is a contest between parties to the litigation.

Finally, the position of the government upon this question is: By the order of suspension of February 28, 1900, the lands in suit were segregated from the public domain open to entry, selection and location. They could thereafter be acquired for no purpose. The local land officers, the Register and Receiver, had, as it were, no jurisdiction whatever over them. They could not entertain any sort of an application to acquire them for the reason that they were not open or subject to acquisition. Accordingly, when selection list 89 was filed, they summarily rejected it. Their action was analogous to that of a court which dismisses a case for want of jurisdiction. They no more considered the evidence upon the merits, that is, as to the character of the land, than



a court would have considered evidence upon the merits of a cause as to which it had decided *in limine* that it was without jurisdiction.

From the order summarily rejecting its application the railroad appealed to the Commissioner of the General Land Office. While the appeal was pending the Commissioner relieved the lands sought to be selected from the suspension. If he had regarded the investigation and report of Ryan and his own order of relief as an ascertainment and determination of the non-mineral character of the lands, why did he not, instead of returning the list to the local land officers, clear-list the lands and issue patent? The answer is obvious: for the reason that the function of passing upon proofs belongs to the local land officers; the lands had been restored to the public domain and were open to appropriate acquisition upon compliance with departmental regulations and requirements; a situation different from that which obtained when the list was rejected was presented; the lands were restored to the condition in which they were before suspension and no want of jurisdiction was now in the way of the consideration of the proofs submitted; and it was necessary that the local land officers pass upon the question of the true character of the lands before patent could issue. Accordingly, the Commissioner, while advising the Register and Receiver that their action in rejecting the list "was correct under conditions then existing", returns the list "for appropriate action" with the statement: "It

would therefore appear that said application to select may now be granted *if no other objection thereto exists*'' (Exhibit 12-O; R. 3835).

The proofs consisted wholly of the Eberlein affidavits. They had accompanied the list when filed, but had in the very nature of the case received no consideration. They could now be considered upon the question of the character of the land, the determination of which in favor of the truth of the affidavits was a condition precedent to clear-listing and patent. If the revocation of the suspension amounted to a determination that the lands were non-mineral, then there was nothing for the local land officers to do. Surely, it will not be suggested that the Commissioner directed his inferior officers to affirm his action. If his action had the effect attributed to it by appellants, he is placed in the absurd position of opening that action to review and possible reversal by his subordinates. What he actually did was to send the list back to the Register and Receiver with directions which amounted to an instruction that they were, under the changed condition, at liberty to hear the railroad's proofs and themselves determine thereupon whether the lands should go to patent. That the only proofs offered or produced during the pendency of the application to select and forwarded to the Commissioner with the appeal were the affidavits of Eberlein appears from the testimony of the Register himself, George W. Stewart. R. 3784-5.) This was all that was required by the regulation heretofore mentioned. The

fact that this was known to the railroad was notice to it of the reliance placed in such proofs and imposed upon it the high duty of strict truth.

## II.

**THE GOVERNMENT HAD NOT PRIOR TO OR AT THE TIME OF PATENT EQUAL KNOWLEDGE WITH APPELLANTS OF THE TRUE CHARACTER OF THE LANDS IN SUIT AND THEREFORE HAD THE RIGHT TO AND DID RELY SOLELY UPON THEIR PROOFS.**

### 1. The question of knowledge.

Little need be said beyond again calling attention to the case of *United States vs. Minor, supra*; to the fact that no official or agent of the government other than special agent Ryan is shown ever to have seen the lands in suit; and to the conspicuous diligence of officials and agents of appellants in the examination and investigation of lands within the granted limits in California prior to and at the time of patent. Furthermore, it was the duty of the Southern Pacific Railroad Company to ascertain the true character of all lands to which it sought patents. This duty arose as well out of the relationship of the railroad to the government by reason of the exception of mineral lands from the operation of the granting act as of the duty imposed by the regulation of the Secretary of the Interior of July 9, 1894, 19 L. D. 21, promulgated pursuant to authority conferred on him by the granting act, requiring proof by affidavit of its land agent of the careful examination of land sought to be patented

and of its non-mineral character. Counsel for appellants contend that such requirement was “merely formal”, the implied argument being that it was therefore immaterial whether the affidavit was false or true. It is sufficient upon this point to suggest that the Supreme Court in the *Minor* case, *supra*, while recognizing that, in the matter of proofs, “what is required is so well known that it is reduced to a formula”, none the less held that, since in that case that requirement, while observed, was falsely met, it vitiated the patent there assailed.

If whatever knowledge Ryan had were imputable to the government, it would amount only to this: that during three days’ examination of thirty-six square miles of land he had found no oil springs, oil seepages nor croppings of oil sand upon the lands in suit and that in his opinion they should be relieved from suspension. From this to knowledge or notice on the part of the government of the true character of the lands is a far cry. It is equally as far removed from the condition which the record discloses of the knowledge of appellants. Since the extent and accuracy of that knowledge must and will be reviewed at length in connection with the main features of the case, namely, the question of the fraud of appellants, it is deemed unnecessary to here anticipate a review of the evidence. Suffice it to say that the record proves conclusively the presence upon these lands or in the immediate vicinity prior to patent of officials of appellants, high and low, ranging from presidents and vice-presidents down to land-graders;



the maintenance by appellants prior to patent of a corps of skilled geologists who examined, investigated and gathered information and facts concerning these and other oil lands; and even the location for minerals of some of the lands in suit and of the even numbered sections with which they are interspersed by geologists, oil experts, engineers and division superintendents of appellants. It is true that the lands granted to the railroad were of such extent as to constitute an empire; but it is equally true that they were but a small fraction of the public domain.

The following from the opinion in the Minor case, *supra*, aptly describes the situation:

“The government owns millions and millions of acres of land \* \* \* There is established in each land district an office in which are two officers, and no more, called Register and Receiver. These districts often include twenty thousand square miles or more \* \* \* When therefore he (an applicant for patent) succeeds by misrepresentation, by fraudulent practices, aided by perjury, there would seem to be more reason why the United States, as the owner of land of which it has been defrauded by these means, should have remedy against the fraud—all the remedy which the courts can give—than in the case of a private owner of a few acres of land on whom a like fraud has been practiced.”

The legal effect sought to be given to the thesis that the government had equal knowledge with appellants is that it had no right to rely on the proofs offered by the railroad, the affidavits in question being, according to the argument of counsel below, “mere red tape”. This position illy comports with

the character which men are in the habit of ascribing to evidence under oath. It is true, as in the Minor case, that "what is required is so well understood as to be reduced to a formula"; but the formula is indicative of the well known character of the proof required—not of a lack of importance or an invitation to falsehood. The "formula", falsely sworn to, was all the fraud there was in the Minor case and yet the court held that the government "should have remedy against that fraud—all the remedy which the courts can give". The "formula", if the appellants had been in need of information, conveyed most accurate knowledge of what had to be proven; and the acting land agent made his oath according to that "formula", swearing falsely to what was necessary in order to secure the coveted patent. The falseness in every particular of his affidavit according to "formula" was shown by the evidence and in at least one particular was admitted by him on the stand (R. 1088). Since the whole includes all the parts and counsel for appellants say that the whole affidavit was immaterial and not intended to be relied on and was not relied on, it will doubtless be urged that it mattered not that the affidavit was admittedly false in one particular. Even in the ordinary affairs of life men do not so lightly appraise an oath and it is surprising that in a court of equity it should be put forward that, because an oath is according to "formula", its falsity is not matter of concern.

## 2. The question of reliance.

There is little direct testimony upon this question. The outstanding fact is that the non-mineral affidavits were made by the regulation of July 9, 1894, set out in full on page 3 of this brief, the *sine qua non* of the issuance of patent. The contention of appellants amounts to this: that, although they could not have secured the patent without it, nevertheless the affidavit was of no moment and the government had no right to rely upon it. The indispensable is not customarily regarded as immaterial and unessential. The fact remains that the railroad could not have gotten the patent if its acting land agent had not made the required affidavits which appellants now say constitute no part of the inducement or showing upon which favorable action was based by the land officers.

The only direct testimony in the record bearing upon this question is that of the government witnesses Finney and Stewart, the former of whom stated that, throughout the entire period of his service in the General Land Office, that is, from 1894 to 1909, that office adjudicated *ex parte* cases, whether selections or entries, upon affidavits or other proofs submitted by the selector or entryman in accordance with pertinent regulations; but that, in cases contested by third parties, it was the practice to have hearings or trials at which the testimony of witnesses might be taken, reduced to writing and thereafter passed upon. He further ex-

pressly stated that, in a selection or entry in which there was no contest by a third person, the department would not base its action upon an agent's report, if one there happened to be, but upon the proofs submitted by the selector or entryman in support of his application (R. 1584). If, however, there was in any case a special agent's report that was unfavorable to the contention of the selector or entryman that the land sought to be acquired was non-mineral, it might result in a rule or order by the Commissioner for a hearing at which both the selector or entryman and the government might introduce evidence concerning the character of the land; but, whether there was no agent's report or there was a favorable one, the *ex parte* proofs offered by the selector or entryman being uncontroverted, it was the practice of the General Land Office to accept such proofs at their face value (R. 1592).

The fact that the railroad recognized and acted upon the necessity of offering proof is conclusive of the materialty of the proof and of its recognition of the effect of the order of relief from suspension, viz., the restoration of the suspended lands to the *status quo* of ante-suspension days.

Stewart, the Register at Visalia, testified that during the pendency and consideration of the application to select the lands in suit—that is, what is so often referred to as list 89—the only evidence of the character of the lands which was offered by the rail-



road and taken into account by the Register and Receiver was the affidavits of Eberlein; and that these affidavits constituted the sole and entire evidence upon the question forwarded to the General Land Office by the local land officers at Visalia (R. 3783-4).

Thus, it affirmatively appears from the testimony of the only witnesses who spoke to the point that the only evidence of the non-mineral character of the lands in suit which was considered by the land department of the government was that offered by the railroad and consisted solely of the affidavits of the railroad's acting land agent which appellants now stigmatize as "*pro forma*" and neither intended nor received seriously; albeit they were addressed to and concerned with the only open question in the matter and constituted the *sine qua non* of the application.

### III.

#### THE LANDS IN SUIT WERE AT THE TIME OF THE PROCEEDINGS THAT RESULTED IN PATENT KNOWN MINERAL LANDS.

##### Introductory.

The case upon which the government relies as laying down the rule or standard for the determination in advance of development of what are known mineral lands is *Diamond Coal & Coke Company vs. United States*, 233 U. S. 236, 58 L. Ed., 936. A review of this case as preparatory to the consideration of the evidence is thought expedient to the end that

the relevancy of the facts may be readily appreciated. This case is the authority upon which Judge Bean, the trial judge, founded the decree from which this appeal is prosecuted. While the opinion postdated the conclusion of the testimony, it was handed down before the argument and decree.

#### THE DIAMOND COAL AND COKE COMPANY CASE.

The Diamond Coal & Coke Company case was a suit in equity brought by the United States in the circuit court for the district of Wyoming to set aside patents to lands alleged in the bill to contain valuable deposits of coal. The patents had been applied for by and issued to two individuals, Sneddon and Harrison, under the homestead law upon soldiers' additional homestead entries, and they subsequently conveyed the lands in suit to the Diamond Coal & Coke Co. Each of the applications for patents had been accompanied by an affidavit by one or the other of these individuals to the effect that he was well acquainted with the land, had passed over it frequently and could testify understandingly about it; that there was not, to his knowledge, any deposit of coal or other valuable mineral within its limits and that it was essentially non-mineral; and that application was made with the object of securing it for agricultural purposes and not of fraudulently obtaining title to mineral land. The bill charged that the affidavits were false and that the entries and patents were procured in the execution of a fraudulent scheme to acquire known coal lands under soldiers' additional homestead entries. The

principal issue in the case was whether the lands were known to be valuable for coal when the applications for the entries were made.

The trial court found for the defendants and the government appealed to the Circuit Court of Appeals for the Eighth Circuit which reversed the action of the lower court, 191 Fed. 186. Thereupon the coal company appealed to the Supreme Court, which, in an opinion delivered by Mr. Justice Van Devanter, affirmed the decree of the circuit court of appeals. The essential facts set out in the opinion are as follows:

“The proceedings in the land office began in May, 1899. Most of the applications were filed during that year and passed to patent in 1901. The others were presented and acted upon in succeeding years. The patents were all secured by means of affidavits and proofs, as before indicated, declaring that the lands were essentially non-mineral, were not known to contain any deposit of coal, and were sought for agricultural purposes, and not as mineral land. For many years the district in which the lands were situate had been known to contain coal. They were surveyed in 1874, and the surveyor reported one of the sections as coal land, the others being contiguous to lands similarly reported. This was shown in the field notes and upon the official plats. The lands were in a valley, 3 or 4 miles in width, bounded on the east and west by foothills. A thick bed of coal was disclosed in the eastern face of the western hills, but its quality was not such as to make it of commercial value. Along the western base of the eastern hills was the outcrop of another coal bed. This outcrop had been weathered

down and in some places covered by the wash from above, but it could be traced upon the surface for several miles. It had been opened up at different places and the openings disclosed a coal bed, from 6 to 14 feet in thickness, dipping to the west at an angle of from 15 to 25 degrees from the horizontal, as did the cretaceous rocks with which it was interstratified. This coal was of superior quality and recognized commercial value and the rocks containing it were the coal-bearing strata of that region. The lands in controversy were west of the outcrop in the direction of the dip. Some were near the outcrop and the east line of the farthest section was about a mile and a half away. There was nothing upon their surface showing the presence of coal beneath nor anything indicating that the bed outcropping on the east and dipping to the west did not pass through them. Unless valuable for coal, they were not worth to exceed a dollar and a quarter an acre. They were arid sage-brush lands, about 7,000 feet above sea level, and afforded very limited pasturage. Without irrigation they were not susceptible of cultivation and the cost of securing water for that purpose was prohibitive. Attracted by this outcrop, the coal company opened a mine thereon in the vicinity of these lands in 1894. In the beginning the output of the mine was small, but it reached 183,750 tons for 1897, 259,608 tons for 1898 and 441,227 tons for 1899.

“An attempt was made by the coal company to acquire a part of the lands in controversy in 1898 by inducing some of its employees and others to make ordinary homestead entries of them under an agreement whereby the company was to bear the expense, compensate the entrymen for the exercise of their homestead rights and receive the title when perfected. The ar-



rangement was fraudulent and in direct violation of the homestead law, independently of the character of the lands. 26 Stat. at L. 1097, chapter 561 Sec. 5, U. S. Comp. Stat. 1901, p. 1388. Sneddon was in charge of the attempt. He was acquainted with the lands and all their surroundings and was well informed upon the subject of coal mining. With the aid of a surveyor he identified the subdivisions to be entered and afterwards selected the men who were to make the entries and directed all that was done, indicating in that connection that the lands were coal lands and were to be taken for that reason, and also to prevent another coal concern from getting them. The entries were made in 160-acre tracts and to give them apparent support cheap cabins were put upon the lands at the company's expense, but the law was not even colorably complied with in other respects. The next year this plan was abandoned and that of using soldiers' additional rights was adopted. These rights were assignable and in their exercise no residence, improvement or cultivation was required. See Rev. Stat. Sec. 2306, U. S. Comp. Stat. 1901, p. 1415; *Webster vs. Luther*, 163 U. S. 331, 41 L. Ed., 179, 16 Sup. Ct. Rep. 963. At the company's request the prior entries were relinquished and the entrymen were severally paid \$500.00 for what they had done, the payment to one being \$600.00. When the relinquishments were filed, Sneddon and Harrison immediately applied to enter the lands with soldiers' additional rights. A few of the relinquished subdivisions were not re-entered and several tracts not covered by the prior entries were included in the new ones, but all of the latter were made with soldiers' additional rights purchased and supplied by the company and were made for its benefit. The price paid by the company for these additional rights was from \$6.00 to \$13.00 an acre. After the entries

were obtained the lands were conveyed to the company and Sneddon was paid \$1,000 for this service, although otherwise regularly employed by the company at the time.

“In 1898, shortly before the dummy entries were made, Sneddon had filed in the land office a sworn declaration of his intention to purchase, under the coal-land law (Rev. Stat. Secs. 2347-49, U. S. Comp. Stat. 1901, pp. 1440, 1441), one of the tracts in controversy, which he then described as containing ‘a valuable vein of coal’. The tract was about a quarter of a mile from the outcrop. At the time of making the soldiers’ additional entries he relinquished the coal filing and included the tract in two of them.

“In 1899, about the time of the additional entries, James Lees purchased from the government, under the coal-land law, and sold to the company for \$3,400, a quarter section upon which earlier exploration had disclosed good coal, 8 feet in thickness. This sale was in execution of a prior arrangement and the price paid to Lees was \$200.00 in excess of that paid to the government. The tract was within a half mile in each of three directions from lands here in controversy.

“As indicative of the weight and importance which men having a practical knowledge of coal mining attached to the outcrop at the time, the government proved by an experienced mine foreman, who had been in charge of large mines known as the Cumberland adjacent to a portion of the lands in controversy, that those mines were opened in 1900 by reason of what was found on the outcrop; that there was no precedent drilling of the adjacent lands; and that in advising the opening of the mines he was guided by what an examination of the outcrop in 1889 disclosed. True, he said, that he could not take

‘a solemn oath’ or ‘be positive’ that unexplored lands in the vicinity of the outcrop and in the direction of the dip contained valuable coal, but his testimony was plainly to the effect that the outcrop, the direction and inclination of the dip and other conditions in 1899 and 1900 afforded reasonable ground for believing that a considerable territory lying west of the outcrop could be mined profitably.

“There was much expert testimony by geologists concerning the outcrop and other known geological data bearing upon the character of these lands. In the main the witnesses were agreed respecting the existence of these physical indicia, but differed as to the conclusions to be drawn from them; the expert for the government maintaining that they afforded convincing reasons for concluding that the lands were coal lands and the experts for the coal company controverting that view. But the divergence was not so pronounced as it would seem, for it was partly due to a difference as to what, in legal contemplation, are coal lands.

“The expert for the government proceeded upon the theory that, when the known surroundings are such that practical coal men would invest in particular lands for coal mining or advise others to do so, those lands are to be deemed coal lands, even though coal has not as yet actually been disclosed within their limits. And having in mind the outcropping coal bed, the direction and inclination of its dip, the character of the rock with which it was interstratified, the quality and thickness of the coal at the outcrop, the proximity of the lands to the outcrop and the topographical and structural features of the vicinity, he gave it as his opinion that the coal bed extended into and through the lands in question and that practical coal men would regard the lands as valuable for coal and

invest in them as such. He accordingly pronounced them coal lands within his acceptance of that term. This conclusion had substantial support not only in the facts already recited, but also in the fact that the company's maps, made three years before the suit was begun, showed that it was intended to project its mining operations westward from the outcrop a mile and a half and had designated the intervening lands, which included some of those in controversy, as coal lands, and in the further fact that the company had returned lands extending westward a similar distance, likewise including some now in controversy, as exempt from direct taxation by reason of a local statute substituting an output tax upon coal mines. Laws Wyo. 1903, chap. 81, p. 101. The return for the year in which the maps were made claimed an exemption of substantially six sections in two tiers of three sections each, although the work of developing the mine (No. 4), as shown by the maps, was still within the east half of the middle section in the eastern tier.

“The experts for the coal company proceeded largely, but not entirely, upon the theory that lands cannot be regarded as coal lands unless coal in quantity and of quality to render its extraction profitable is actually disclosed within their boundaries. One testified that, even if a slope were driven from the outcrop to within five feet of the vertical boundary of one of the sections in question and in good coal all the way (a fact proved but not to be considered here because in the nature of a discovery subsequent to the entries), it would not show that the section approached was coal land, there being no actual exposure of coal within its limits. And he added that it would be the same if the distance were 3 inches instead of 5 feet, but that ‘the moment you cross the line, then it commences to be coal



land'. Special emphasis was laid upon the uncertainties incident to coal mining in the cretaceous areas of the West by reason of the occurrence of faults, wants, thinning and the like; and this, it was said, required that actual exposure of coal within the land, by an outcropping at the surface or an excavation, be accepted as the true and only test. But even such a test was largely discredited by statements that 'a good outcrop at the surface may represent a want below or a want at the surface may represent a coal below', and that in following a good discovery a fault or thinning, as well as a want, may be encountered at any moment. It was conceded, however, that the coal horizon—meaning the coal-bearing strata shown at the outcrop, but not necessarily the coal—passed through the lands in controversy and one expert, while declaring that he could not make an affidavit that they were coal lands in the sense of 'strictly containing deposits of coal', candidly added: 'But I would be prepared to make an affidavit that I believe them to contain coal'. Another, although pronouncing the showing at the outcrop and elsewhere insufficient to render the lands valuable for coal mining, said: 'I am not prepared personally, to either affirm or deny that this land does or does not contain coal. I contend that it is beyond the capacity of any man to say that something exists or does not exist upon which he has no absolute testimony'.

"It is of some significance that Sneddon—who had long been in the company's service, had been the central figure in the acquisition of these lands, was familiar with them and the purpose for which they were sought and acquired, was the company's superintendent when the evidence was taken before the master and was present during a part, at least, of the time when it was being taken—was not called by the com-

pany as a witness and that statements, declarations and acts attributed to him and which made against the company were permitted to go undenied and unexplained.

“We think the evidence, rightly considered, shows with the requisite certainty that at the time of the proceedings in the land office the lands were known to be valuable for coal. Otherwise they had only a nominal value, not to exceed \$1.25 an acre, and yet easily ten times that amount was voluntarily expended by the company in acquiring them. It was hardly intending to make an aimless or grossly excessive expenditure. It was a practical concern, operated by practical men. It had located a mine upon the outcrop five years before and in the meantime had proved the wisdom of the undertaking by its mining operations. They had disclosed the existence of an extensive bed of valuable coal dipping to the west under the valley and in that way had supplemented the evidence afforded by the outcrop and its surroundings. Without any doubt these considerations induced the company to believe, and rightly so, that the lands in controversy possessed a value for coal mining greatly in excess of their value for any other purpose. This explains the expenditure and the persistency of the company’s efforts to acquire them; and the fact that the earlier effort was obviously fraudulent and unlawful, independently of the character of the lands, serves in no small degree to explain the kindred practices employed in the later effort. In short, the company, without care as to the means, sought and acquired the lands because it regarded them as valuable for coal. Its view and purpose were also reflected by its maps and tax returns. Of course, it was not a *bona fide* purchaser from Sneddon and Harrison, for they were mere agents representing it as an undisclosed principal.

“An exposure to the eye of coal upon the particular lands was not essential to give them a then present value for coal mining. They were all adjacent to the outcrop and above the plane of the coal-bearing strata dipping under the valley. In alternate even-numbered sections they substantially paralleled the outcrop for seven miles and in two places were separated from it by only a few rods. Those to the north were opposite the company’s developed mine (No. 4) and those to the south were opposite the tract acquired through Lees, upon which good coal was disclosed. The outcrop, the disclosures in the vicinity and the geological formation pointed with convincing force to a workable bed of merchantable coal extending under the valley and penetrating these lands. These conditions were open to common observation and were such as would appeal to practical men and be relied upon by them in making investments for coal mining. They did so appeal to the Cumberland people, as well as this company, both large concerns represented by men of experience, understanding the uncertainties and hazards of the business as well as its rewards. No doubt it has its uncertainties and hazards, but the evidence shows that they are not so pronounced as indicated by the company’s experts.”

The court takes full notice of “the respect due to a patent” and the other usual arguments based on the solemn character of such an instrument and thereupon lays down the following rule:

*“To justify the annulment of a homestead patent as wrongfully covering mineral land, it must appear that at the time of the proceedings which resulted in the patent the land was known to be valuable for mineral: that is to say, it must appear that the known conditions at the time of*

*these proceedings were plainly such as to engender the belief that the land contained mineral deposits of such quality and in such quantity as would render their extraction profitable and justify expenditure to that end."*

The most casual reading of the quoted language will disclose that the court was laying down a rule or formula for the determination of what is *known mineral land* and the language employed, as well as the context and the facts, indicates very clearly that, while the coal company insisted that an actual exposure of coal on each unit of the lands in suit or the development of the land by the "work of man" eventuating in the disclosure of the presence of coal in commercial quantity and of commercial quality were necessary to place the lands in the category of known mineral lands, the court repudiated that contention and held that, where there is absolutely neither natural exposure nor development, lands are mineral lands when the known conditions are plainly such as to engender the belief that they contain minerals quantitatively and qualitatively commercial.

Appellants assert and contend that the instant case is not within the principle upon which the Diamond Coal & Coke Company case was decided; while the government confidently maintains that it is. In the closing paragraph of the opinion Mr. Justice Van Devanter says: "Neither are we considering other minerals whose mode of deposition and situation in the earth are so irregular or otherwise unlike coal as to require that they be dealt with along other lines."



The government asserts that upon this record oil is shown to be in the same class with coal with respect to "mode of deposition and situation in the earth" and that in all respects the two minerals are so similar as to be dealt with along the same lines. As already indicated, if the rule is not applicable to oil, it is restricted solely to coal—and the language of the opinion is plainly such as to indicate that the court intended no such limitation. The standard laid down is not expressly restricted to coal, but impliedly extends to other minerals, while only those are excluded whose "mode of deposition and situation in the earth are so irregular or otherwise unlike coal as to require that they be dealt with along other lines". If oil is not within the rule, then, manifestly, the rule, contrary to the implication, is restricted to coal. The immediate purpose of this introduction is to show by the record the striking similarity in the "mode of deposition and situation in the earth" of the two minerals, coal and oil; and in this connection reference will be had principally to the testimony of two eminent geologists, Dr. John Casper Branner, President Emeritus of Leland Stanford Jr. University, and A. C. Veatch, although that of others will be alluded to.

In 1897 Mr. Veatch was connected with the Indiana University Geological Survey in charge of a section doing field work in Indiana. In 1898 he was a member of Cornell University Geological Survey working on the coastal plains from New Jersey to Mississippi. From 1898 to 1900 he was assistant State geologist of Louisiana and in 1901 was assist-

ant in charge of areal and stratigraphic geology in Cornell University summer school of field geology. In 1901 and 1902 he was geologist of the Houston Oil Company working in the Louisiana and Texas oil fields. In 1902 he became professor of geology in the State University of Louisiana and State Geologist, resigning these positions to accept a position with the United States Geological Survey with which he was connected from December, 1902, to 1910. In 1910 and 1911 he was engaged in work in the Trinidad and Venezuela oil fields and after his resignation from the Survey was engaged as a consulting geologist. While with the United States Geological Survey he was chairman both of the coal land classification board and the oil land classification board. In 1907 he had been appointed by the President of the United States a special commissioner to investigate the mining laws of Australia and New Zealand (R. 687-8).

Mr. Veatch was "the expert for the government" referred to by Mr. Justice Van Devanter in the Diamond Coal & Coke Company case. While in that case there was much expert testimony concerning a distant outcrop of coal and other geological data concerning adjoining and surrounding lands bearing on the character of the lands there in suit and while there was little disagreement respecting the existence of such physical indicia, the experts for the coal company and the expert for the government differed as to the conclusions to be drawn from them. The main attack of the coal company's experts was cen-

tered upon Veatch's definition of what constituted coal land. The Supreme Court disregarded the testimony of the coal company's experts and adopted and wrote into its decision his definition.

Upon the subject in hand Mr. Veatch testified in substance as follows:

Where minerals occur in stratified beds, it is frequently possible to determine with exactness their extent and value and other factors important in their appraisalment and development. Stratified rocks are laid down in relatively regular layers, for the most part beneath the sea, and are in contrast with other rocks formed by igneous intrusions or volcanic outpourings or which have been so attended by metamorphic action as to lose their former characteristics. The individual layers of stratified deposits can be traced for many miles, showing to a great extent the same characteristics; and it is on this regularity or irregularity, as shown by the outcrop, that practical men base their conclusions and have spent great sums of money in developing minerals of the kind which occur in stratified deposits, among the most important of which are coal, oil, water and the phosphates. These differ widely in their mode of occurrence from most deposits of ores and entirely from veins or lodes, which are of very irregular character. It is on the exposure of stratified rocks containing coal, oil, water and the phosphates caused by uplifting, folding and erosion that the geologist bases his conclusions. The beds, after deposition, are folded up and eroded and the effect is to enable

the geologist to examine the character of the rocks as fully and carefully as he could in an enormous trench dug through the surface of the earth. Extending for many miles it forms a much sounder basis for judgment than a single development. (R. 696-7.)

Both coal and oil occur in stratified deposits and are subject to much the same laws. In the case of a coal deposit, where erosion has entirely removed the strata around a given area, that area rises as a hill above the surrounding area. If in such a case you find the coal outcropping on one side of the hill and you follow the coal bed around the hill, as you can by natural exposures, and find that it goes entirely around the hill, you know absolutely that the coal underlies the hill and are justified in buying that land as coal land in the absence of any development. In a similar way, if you find a coal bed exposed on the side of a valley and follow the bed around the valley, you know that the valley is underlaid with coal; and by the rate of slope of the beds you can calculate the depth of that coal bed in that area which is underlaid with it. (R. 698.)

In the case of oil or water you can follow the sand bed or other porous bed suitable for containing them in exactly the same way in which you follow a coal bed. You can determine the existence of that porous stratum in the same way in which you can determine the existence of the layer of coal and in a similar way you can calculate the thickness of the depth of that porous bed under different portions of the territory. You follow the same method. (R. 698.)



The presence of oil or water in the porous bed can be indicated either by springs along the outcrop in the case of water or seepages in the case of oil or, failing these, their presence may be demonstrated by a well or group of wells. Such a well or group of wells or such seepages, taken in connection with the determinal persistence of these beds and the geological structure, warrants the development of territory in which you have not drilled. It shows the presence under the lands of the substance desired. (R. 698-9.)

The oil value of land may be demonstrated in the same way in which coal can be demonstrated by the outcrop. The principle is the same in every way. It has frequently been demonstrated in advance of drilling (R. 700-1).

With specific reference to the lands in suit Mr. Veatch, after mentioning the long line of seepages along the east flank of the Temblor Range in the vicinity of the lands in suit and the great series of wells which had been sunk prior to the patent down the dip from these seepages showing that the seepages represented oil in commercial quantities (R. 701-2) and after stating that the strata dipped from the direction of these seepages and wells towards the Elk Hills, the locality of the lands in suit, and that the Elk Hills are within the proven area from geological deductions, testified in substance as follows:

The determination of the oil value of the lands in the Elk Hills is predicated on the seepages which

occur along the flank of the Temblor Range. They prove the extent of the oil impregnated zone and in that way demonstrate the oil value of the Elk Hills (R. 704).

Dr. J. C. Branner, whose qualifications are set out somewhat in detail on pages 1000 and 1001 of the record, may, without disparagement of others, be described as the most eminent oil geologist on the Pacific Coast. He has had wide experience in the oil fields of California, has visited and examined many of them, including the lands in suit and others in the neighborhood. His character is so exalted and his attainments so conspicuous that counsel for appellants admitted that he was not "open to impeachment" (R. 1992). At the time of testifying he was professor of geology in Stanford University and subsequently became its honored president. Dr. Branner's testimony in this case is best read as a whole. A mere reference to that part of it bearing upon the question instantly under discussion is here attempted:

After detailing somewhat the presence and conditions of seepages and wells along the east flank of the Temblor Range, the presence of immense thicknesses of Monterey shales, the recognized and admitted source of oil in that region, the geologic conditions consisting, among other things, of the dip of the strata from the seepages and wells in the direction of the Elk Hills, Dr. Branner stated that, although at the time to which his testimony related there was absolutely no development in the Elk Hills,

“the geological structure was perfectly clear” (R. 1002), and his opinion was that the “Elk Hills was the most promising area for petroleum in that region in the vicinity of McKittrick” and that they were “oil-bearing” (R. 1003). His conclusion was the result of geologic deduction and he said:

“I should say that, if any competent geologist, observing the natural waste of oil about McKittrick and the stage of development in 1900 or a year or two subsequent and visiting the Elk Hills and making some examination of the structural formation, failed to form an opinion that the Elk Hills were oil in character and that there was an oil bearing zone underneath those hills, he did not understand his business” (R. 1004).

Dr. Branner stated that, taking into consideration the developments that had been accomplished off the lands in suit in 1904 and the geologic structure of the region, he would in 1904 have advised the purchase of these lands for their oil value at a price in excess of their value for agriculture (R. 1005). He also testified that practical men invest money in oil territory in advance of drilling on the advice of geologists and he regarded that practice as fully justified by the results (R. 1006).

With reference to the “risk” in petroleum mining as compared with the mining of the precious metals he testified in substance as follows:

“I am familiar with the methods of quartz and gold mining and with petroleum mining and consider that, so far as metal mining is concerned, the finding of traces of gold or silver on

the surface of a ledge or lode does not amount to anything more than the merest suggestion, whereas in the case of the Elk Hills I consider that the evidence makes it worth going ahead without any other evidence than the geology itself and disregarding any drilling or actual development in the hills themselves. That evidence existed as early as 1900." (R. 1023.)

Dr. Branner also testified that there is no such uncertainty in petroleum mining as in quartz mining and that, next to coal mining, the mining of petroleum, based solely on geologic evidence, is the surest kind of mining (R. 1024).

These views find ample support in the testimony of other witnesses and brief references to that of Frank Barrett, W. E. Youle, John R. Scupham, F. O. Martin and J. A. Taff follow:

Captain Frank Barrett when on the stand was sixty-seven years old and had been in the oil business practically his entire life, having operated in Pennsylvania, West Virginia, Kentucky, Ohio, Texas, Indiana and California. He brought in the first paying well in the Coalinga field, having come to California about 1885 (R. 478). He stated that he had found, to his sorrow, that placer and gold mining were much more uncertain than the oil business and denied on cross-examination that a practical oil driller has just as much chance to tell where oil is as a scientific geologist, stating that a good practical driller may not know exactly where to locate his well, while a man who understands the formation



and the topography of the country will locate the well and turn it over to the driller (R. 486).

W. E. Youle, whose qualifications as an expert are set out on pages 540, 541, 542, 543 and 544 of the record, had been in the oil business fifty years, having begun in Pennsylvania in 1863. He had had wide experience in California, having discovered and exploited many of the now important fields, and had had phenomenal success in determining the presence of oil. Upon this record he stands out par excellence as combining in conspicuous measure knowledge of oil both scientific and practical. He had not, in his experience of fifty years, failed in a single instance to find oil sand in any place in which, before drilling, he had thought that he would find it (R. 567); and the context shows that he based his "thought that he would find it" on geologic evidence. Especially pertinent to the question under immediate review is his testimony that, while the discovery of oil in one section does not indicate to a practical oil man that oil will be found in every other section in the township, experience has shown that oil is not confined to the well in which it is found, but that it "has a direction somewhere" and that, in consequence of that fact, after a discovery you will find oil men locating and acquiring lands quite distant from the discovery well (R. 579). He further stated that many years before he had seen the uplift and fold in the Elk Hills and because of these surface conditions had advised the location of several sections (R. 579).

In speaking, as indicated, of “the direction” of oil it is clear that Youle referred to the sand which is the reservoir of the oil; and the fact that oil men locate land at a distance from new wells is a recognition by them of the persistence of the sand and of the fact that by determining its dip and direction it is possible to trace the oil sand underground and locate producing wells at a distance upon the basis of these known conditions, the presence of oil at a given place and the direction and dip of the containing stratum of sand—being the identical principle upon which it is held in the Diamond Coal & Coke Company case that lands may in advance of actual development be determined to be coal lands.

John Scupham had entered the service of the Central Pacific Railroad Company in 1865 as a civil engineer. In 1874 he was recalled from field work and was made consulting engineer reporting to the directors Leland Stanford, Charles Crocker, Mark Hopkins, C. P. Huntington and their successors. He came into contact frequently with these directors and, among other things, examined mineral lands for them. Upon his advice various coal properties had been acquired. He did pioneer meteorological work and reported on artesian water projects in the San Joaquin valley and sank the first successful artesian well (R. 586). In 1887 A. N. Towne, general manager of the Southern Pacific Railroad Company, sent him to make an examination of the asphalt deposits around McKittrick. What he found and the results of his report are told elsewhere in this brief. Suffice

it to say that he came to the conclusion at that time that the lands in suit were oil lands and so advised the directors of the railroad (R. 588).

With particular reference to the striking similarity between coal and oil mining Scupham, who had had wide experience in both, testified that there is a relation between the means by which one determines the depth of artesian basins and coal measures and that of oil measures or oil sands based upon the controlling principle of the stratification, that is, the direction and dip of the strata (R. 599).

J. A. Taff was a geologist in the employ of appellants who testified as a witness for them. He had been on the United States Geological Survey and had had experience in classifying coal lands. He admitted that it is possible and usual to do this in advance of development. He testified that in geological examinations the succession of the beds and the extent to which oil is likely to occur are determined in the same way in which is determined the extent of coal beds (R. 2768).

F. O. Martin, an expert mineralogist and geologist (R. 609), testified in effect that oil mining is much less uncertain than lode mining (R. 617-8) and that the conditions of the accumulation of oil and the appearance of valuable metals such as gold are quite dissimilar, the conditions favoring oil (R. 619).

It is practically without dispute upon the record and it appears from the foregoing testimony that oil,

like coal, occurs in stratified sedimentary rocks; that oil sands, like coal, are, within reasonable limitations, persistent; and that oil, in its mode of deposition and situation in the earth, is like coal and unlike minerals found in lodes.

To be sure, there is testimony on the part, principally, of interested Southern Pacific Company geologists to the effect that oil sands, meeting obstructions, are interrupted; that at times and in places they "thin" or are "pinched out"; and it is urged that by reason thereof the principle of the Diamond Coal & Coke Company case is not applicable to the determination of what lands are "known oil lands". It is sufficient at this point to answer that these contentions lack novelty—they are the identical contentions advanced by the defendant in the case in question and are noted and conclusively disposed of by the opinion of the Supreme Court, while in the circuit court of appeals it is said that, as urged, they amount to "a condemnation in general of the practical value of the coal beds of the west".

That lands may in advance of development be determined to be known oil lands upon the same basis as that laid down in the Diamond Coal and Coke case is not without legislative recognition and sanction. On July 2, 1864, the government made to the Northern Pacific Railroad Company a grant of land similar in all essential respects to the grant under which appellants claim. By an act approved February 26, 1895, Congress provided for an exam-



ination and classification of the lands within the primary indemnity limits of the Northern Pacific grant with reference to their mineral character and therein made a legislative declaration of what evidence is competent and proper to determine the character of such lands. That declaration, made, as is seen, nine years before the selection by the Southern Pacific Railroad Company of the lands in suit, recognizes clearly the propriety and practicability of determining by geologic evidence what are known oil lands. The pertinent section of the act in question follows:

“Section 3. That all said lands shall be classified as mineral which by reason of valuable mineral deposits are open to exploration, occupation and purchase under the provisions of the United States mining laws; and the commissioners, in making the classification hereinafter provided for, shall take into consideration the mineral discovered or developed on or adjacent to such land and the geological formation of all lands to be examined and classified or the lands adjacent thereto and the reasonable probabilities of such land containing valuable mineral deposits because of its said formation, location or character. The classification herein provided for shall be by each legal subdivision, where the lands have been surveyed. If the lands examined are not surveyed, classification shall be made by tracts of such extent and designated by such natural or artificial boundaries to identify them as the commissioners may determine. Where mining locations have been heretofore made or patents issued for mining ground in any section of land, this shall be taken as *prima facie* evidence that the forty-acre subdivision within which it is located is mineral land. Provided, that the word ‘mineral’ where it appears in this

act, shall not be held to include iron or coal; and provided, further, that the examination and classification of lands hereby authorized shall be made without reference or regard to any previous examination or report or classification thereof." (28 Stat, at L. 683.)

In the Diamond Coal and Coke Company case the contention was that the drill was the only test of the coal character of land. Indeed, this is an understatement of the contention there urged, as appears from the opinion of the Supreme Court and particularly that of the circuit court of appeals. In the former is found this passage:

"Special emphasis was laid upon the uncertainties incident to coal mining in the cretaceous areas of the West by reason of the occurrence of faults, thinning and the like; and this, it was said, required that actual exposure of coal within the land, by an outcropping at the surface or an excavation, be accepted as the true and only test."

In the circuit court of appeals the opinion of Judge Hook contains the following language:

"The defendant gives a number of reasons for its position that the lands in suit are not coal lands. It says, which is true, there is no evidence upon their surface of coal content. The long line of outcrop lies to the eastward. It also says that the only way to determine with the certainty required by law is to explore with a drill; and that has not been done. One of defendant's principal witnesses testified that, in the absence of an actual outcrop of coal, a tract of land should be laid out in thousand foot squares and a hole drilled with a diamond drill

to the requisite depth at each corner. He also said that in the case here the cost would be prohibitive. His contention was, and it is substantially that of defendant, that land could not be regarded as coal land unless coal is actually exposed naturally or artificially; in other words, at the time it is acquired from the United States there must be either a natural outcrop or an actual disclosure by the work of man; visible evidences of coal veins upon adjacent lands and geological probabilities, however strong, as to the lands in question, will not suffice." (191 Fed. 786, 794.)

So, in the instant case the contention is that the drill is the only test, this requirement being urged in several forms and clothed in various language. On the argument below "wells in the plural" was the formula; and at all times it has been vehemently proclaimed that nothing short of absolute "knowledge" of the presence upon the identical lands in suit of oil of present commercial quantity and quality will suffice to remove them from the category of agricultural non-mineral lands. In the Diamond Coal & Coke Company case both the Supreme Court and the Circuit Court of Appeals for the Eighth Circuit repudiated this doctrine and held that lands may by proof of known conditions that are such as to engender the belief that they are commercial coal lands be determined to be coal lands.

The testimony from the record already recited proves the striking similarity in the occurrence and mode of deposition and situation in the earth of coal

and oil. If, then, the standard of the Diamond Coal & Coke Company case is not applicable to oil, it must be rigidly restricted to coal; and, as already pointed out, the language of the opinion excludes only those minerals "whose mode of deposition and situation in the earth are so irregular or otherwise unlike coal as to require that they be dealt with along other lines". Inferentially, it applies to those minerals not within the described exclusion. Judge Bean found that the standard was applicable to oil and so held. Congress nearly twenty years previously had recognized the soundness of geologic evidence as the basis of determining whether given lands are oil lands and in the instance cited above by legislation prescribed it as the basis of such determination.

While now denying the propriety of determining the oil character of lands by geologic evidence and affirming that, on the contrary, the drill is the only test, the record demonstrates that even before the date of the assailed patent appellants were themselves by geologic evidence alone segregating from their vast holdings large areas of lands upon which there was neither exposure nor development, classifying them as oil lands and withdrawing them from sale by their land department as agricultural lands. Three years later upon geologic evidence alone the Southern Pacific Railroad Company, one of the appellants, leased to the Kern Trading & Oil Company, another of appellants already shown on pages 11 and 12 of this brief to have been a subsidiary of and



owned by the Southern Pacific Company and, in reality, merely its "fuel department", hundreds and thousands of acres of lands upon which there was neither exposure of oil sand nor development—indeed, nothing beyond favorable structure, formation and relation to proven lands in some instances many miles distant. Upon the very principle upon which the government contends that the lands in suit were shown by the known conditions to be oil lands appellants segregated and classified lands as such; and it is both instructive and interesting to note that some of the lands so determined by appellants to be oil lands and as such segregated and leased to an oil production company adjoin and are interspersed with the very lands which the government contends were known oil lands at the time when they were selected by appellants and falsely represented to be non-mineral agricultural lands. Since more extended reference to the evidence proving the indicated action on the part of appellants will be hereafter made in connection with another phase of the main question under consideration, only brief attention is accorded it now.

From 1893 to the summer of 1903 J. B. Treadwell was the oil expert of the Southern Pacific Company (R. 424). He got data or information upon which he made recommendations of lands to be withdrawn from sale from "personal investigation" (R. 432-3). Exhibit 115 is a map introduced by appellants showing the withdrawal made by him in 1900. An examination of it, as well as the evidence of Treadwell

when called as a witness for appellants, shows that it included lands further away from the outcrop or producing wells than the lands in suit. Indeed, he included in his withdrawal sections 3, 5, 7, 9 and 17 and the NW $\frac{1}{4}$  of section 19 and all of section 21 of the very township in which are the lands in suit and the map, read in connection with its legend, shows that those lands were "shaded tracts reserved from sale because in or near oil territory". (R. 3002.) Explaining the principle upon which he selected lands to be withdrawn from sale Treadwell testified that he "followed the system of taking the trend of the oil and located enough so as to be sure to go far enough on the dip to include all the oil that they in the future might develop and even further". (R. 437.) This was while he was on the stand as a government witness and long before appellants introduced Exhibit 115, Treadwell testifying as a government witness that all of his maps had been destroyed in the fire of 1906 (R. 433-4); and he then, in ignorance of the fact that Exhibit 115 would be produced to contradict him, stated that he did not include in his withdrawal any part of the Elk Hills (R. 435). Exhibit 115 shows that he did include considerable portions of the Elk Hills and, indeed, every section of land adjoining in every direction the lands in suit; and he himself in effect admitted that, if he had not been ignorant of the fact that the lands in suit had been surveyed and if they had been then patented to the Southern Pacific Railroad Company, he would have shaded and reserved them from sale (R. 3458-9).

Thus it is shown that four years before the patent now assailed appellants through their oil expert followed the "system of taking the trend of the oil" for the purpose of determining what lands were oil lands. Following the "system of taking the trend" along the dip can mean nothing less than that he started from the exposure or well, ascertained and followed the dip of the strata and determined geologically that lands on the dip, though many miles away from the exposure or well, were oil lands. Can appellants be heard to complain that the government invokes the very "system" employed by their own expert?

In 1903 the Southern Pacific Company, wishing to separate its oil production from other departments, created a "fuel department" and organized it into a corporation, the Kern Trading & Oil Company (R. 3085). Instructions were given to its then head geologist, E. T. Dumble, to select the oil lands of the Southern Pacific Railroad Company to be leased to and operated by this new department (R. 2911). Dumble submitted the questions of the lands to be selected to Josiah Owen, a geologist and field man of appellants (R. 2910). The Kern Trading & Oil Company lease, of which much will be heard later, contains the catalogue and description of the lands so selected (Ex. YY; R. 1101, 1106-7). This lease includes section 31 in township 30-23, the township in which the lands in suit lie, section 25 of 30-22 and section 5 of 31-23, adjoining or cornering the lands in suit; from which it appears that in 1903

appellants were then following the "system" inaugurated by Treadwell and to the application of which they now object; for they were then transferring to their "fuel department" as oil lands sections upon which there was neither exposure nor well and which, accordingly, they could determine and did accordingly determine to be oil lands solely upon geologic evidence—that is, by following the dip of the strata from known exposures or wells and assuming the continuation and persistence of the sands and contained oil. It is surely not doing violence to the proprieties to observe that the estimate placed by appellants in 1900 and 1903 upon geologic evidence is in striking contrast to the execration and contumely with which they now view it. Then it was a useful basis for practical operation—now it is condemned as synonymous with "guessing".

In the Diamond Coal and Coke Company case the basic facts were the outcrop to the east and the dip of the strata towards the lands there in suit. All that was there conceded was that "the coal horizon—meaning the coal-bearing strata shown at the outcrop, but not necessarily the coal—passed through the lands in controversy". From this it was held that the presence of coal under the lands in question could be assumed or deduced. In the instant case there are the long line of seepages and many wells to the west and the known dip of the oil-containing sands towards the lands in suit and, in addition, the record is not without evidence of the known presence of oil sand and outcrop upon and beyond the lands



in suit. Indeed, the parallel is complete. In the case of coal the Supreme Court says that upon such evidence practical men invest large sums of money. The like appears from the testimony already recited in the case of oil; and it will hereinafter be shown that practical men in the case of the Elk Hills upon no more evidence than this record discloses invested more than half a million dollars.

September 21, 1903, E. T. Dumble, chief geologist of appellants, wrote a letter to Julius Kruttschnitt, then assistant to the president of the Southern Pacific Company (R. 2912), being defendant's Exhibit 119, in which he offered certain suggestions concerning the operation of the newly formed "fuel department", the Kern Trading & Oil Company. After advising that the "Kern Trading & Oil Company should acquire by purchase or lease such lands now belonging to the Southern Pacific Company *as we consider valuable for oil purposes,*" he proceeds as follows:

"The attached maps show these under three heads: first, oil lands proven or practically proven, colored red; very probable oil lands, colored green; probable oil lands, colored blue. Of the oil value of the first two classes there is very little doubt; *the third depends in part upon the continuance of normal dips and conditions, but in addition it represents untested anticlinals which show good indications of oil.* I consider that all of these lands should be under the control of this company." (R. 2912-3.)

In this letter the chief expert of appellants is seen in 1903, a year before patent, concluding from geo-

logic evidence alone that certain lands are oil lands. That is, starting from the proven he concluded that unproved lands contained oil because of the persistence of oil sands known at the proven point to contain oil. His course of reasoning manifestly and necessarily was that, since at one point or at several points he found oil either in a seepage or in a well, he would find it at a distance along the continuation of the stratum of sand which was found to contain oil at the point of starting, provided the dip and conditions continued normal—an illuminating application in 1903 to oil of the principle many years later approved by the Supreme Court for determining that lands are coal lands. His deduction was purely geologic and the counterpart of the reasoning of Dr. Branner, Veatch, Barrett, Youle and Owen,—resting upon the basis of classification approved by Congress and applied by the court of last resort.

It remains to note reports of the geologist of appellants concerning the persistence of the oil sands so conspicuous at McKittrick.

E. T. Dumble, chief geologist of the Southern Pacific Company, said of Josiah Owen that he had a faculty of carrying underground conditions in his mind more perfectly than anyone whom he had ever known (R. 3037). Owen was an expert oil geologist of appellants from 1902 to 1909. In February, 1903, he took up the investigation of the oil field at McKittrick and on March 25, 1903, made a detailed report to Dumble which was introduced by the gov-

ernment as Exhibit 4-J (R. 1615). McKittrick, it will be remembered, is four miles west of the lands in suit. Of the McKittrick field he says:

“There is but one oil horizon in this field. . . . In the direction of Midway I find that the McKittrick fold flattens out in the valley, but other hills further on in the same direction would indicate that it may extend to near the Kern lake. The Midway oil sands belong to the same horizon as the McKittrick oil sands.” (R. 1617.)

It cannot be known positively whether by “other hills” Owen intended to refer to the Elk Hills or the Buena Vista Hills or both; but the inherent probabilities are that he had in mind both. Further on in this report he says:

“I have *traced the outcrop* of the oil horizon all the way to Sunset oil field and find that there is *but the one oil sand*. I believe it will be possible to trace the same horizon to the Kern River fields. There are several reasons for believing that they all belong to the same zone.” (R. 1620.)

A line drawn from McKittrick to the Kern River fields would pass through the north end of the lands in suit, the distance from McKittrick to the lands in suit being four miles and from the lands in suit to the Kern River fields about twenty-five miles.

Thus in 1903 we have the evidence of this expert field geologist of appellants themselves that by geologic evidence he had arrived at the conclusion that the oil sands persisted from McKittrick under the

lands in suit and, indeed, twenty-five miles beyond. His report is eloquent of his faith prior to the assailed patent in the value of geologic evidence in determining the direction and persistence of oil sands from the point where their presence is proven by natural exposure or actual development. Obviously, he employed and followed the same course of reasoning and deduction advocated by "the expert for the government" in the Diamond Coal & Coke Company case and approved by the Supreme Court. He believed that the oil horizon at McKittrick, under the Elk and Buena Vista Hills and in the Kern River fields was one and the same—the exact parallel of the admission in the Diamond Coal & Coke Company case that the coal horizon—not the coal itself, but only the strata which in the outcrop contained coal—passed under the lands there in controversy.

In 1910 there had been no development whatever in the Elk Hills. Their condition was in all respects as it had been in 1903 and 1904; but, nevertheless, the Associated Oil Company, at that time controlled and dominated by the appellants (R. 3592) which owned fifty-one per cent of its capital stock and having as the chairman of its board of directors Mr. Wm. F. Herrin (R. 3613), the general counsel of appellants and a vice-president of the Southern Pacific Company (p. 20 of Vol. of "Documents and Evidence Not Printed"), spent more than half a million dollars in the development for oil purposes of even numbered sections interspersed with the



lands in suit and completely surrounding parts of them (R. 3123). The evidence in proof of this fact was offered by appellants. This action of the Associated Oil Company constitutes a striking instance of the application to oil of the identical principle upon which, in the case of coal as pointed out by the court in the Diamond Coal and Coke Company case, practical coal men "regard lands as valuable for coal and invest in them as such". It is true that the evidence in question relates to a period postdating the patent; but that subtracts nothing from its relevancy and competency upon this point or from the inescapable implication that practical oil men follow in the footsteps of practical coal men and invest their money upon faith in the reliableness of geologic evidence and deduction.

Enough has been shown, it is submitted, to demonstrate the soundness of the thesis that the rule laid down in the Diamond Coal & Coke Company case is applicable to the instant case and furnishes the test by which it could have been determined before patent and in advance of development, upon the basis of the known conditions hereinafter to be reviewed, that the lands in suit were known mineral lands.

There is in reality but one question in this case:

Were the known conditions at the time of the proceedings which resulted in the assailed patent plainly such as to engender the belief that the lands in suit contained oil in such quantity and of such quality as would render its extraction profitable and justify expenditures to that end?

Next, therefore, will follow an examination of the evidence showing these conditions and leading irresistibly to the conclusion that they were not only of the character required by the rule, but that they actually engendered in the Southern Pacific Company and the Southern Pacific Railroad Company the belief required by the rule. What the known conditions were will be treated under the heading:

### **THE KNOWN CONDITIONS.**

This topic will be subdivided into the following heads, some of which will themselves be appropriately subdivided:

#### **A. Conditions and knowledge thereof.**

1. Structure of the lands in suit.
2. Situation of the lands in suit with reference to the accepted source of oil.
3. Evidences of oil in the Elk Hills.
4. Seepages and oil sands in the neighborhood generally.
5. Oil development in the vicinity of the lands in suit.
6. Geological connection between foregoing lands and those in suit.
7. Non-agricultural character of lands in suit.

#### **B. Belief, general and specific.**

## 1. STRUCTURE OF THE LANDS IN SUIT.

(a) *Anticlinal.*

The lands in suit lie on both sides of the summit of the Elk Hills (R. 690) and for convenience are referred to herein as the Elk Hills.

The structural character of the Elk Hills is evident to the most casual observer (R. 702). Structural hills are contradistinguished from hills that owe their form or elevation to erosion, that is, that are left upstanding above the surrounding surface because of the greater resistance of the materials of which they are composed. Structural hills owe their elevation to torsion of the crust of the earth, by which the stratified beds of which they are composed are folded so that they are thrust or pushed above the general level of the country. The Elk Hills constitute an anticlinal fold in which the present topography shows the essential slope of the fold. That fold has a few wrinkles in it and it is these wrinkles in the grand uplift or fold which are referred to as different anticlines—they are anticlinal axes of minor folds, the hills themselves being a great fold. ( R. 714).

The Elk Hills are, like their neighbors, the Buena Vista Hills, an elongated dome of ideal structure for oil accumulation. (R. 702-3).

That an anticline runs through the Elk Hills is not in dispute. Indeed, this anticline was observed and carefully traced prior to patent by Josiah Owen,

a skilled geologist of appellants, on a map which he enclosed in a letter of March 25, 1903, to E. T. Dumble, chief geologist of the Southern Pacific Company (Ex. 157; R. 2977). Owen had entered the employ of the appellants in the fall of 1902. (R. 2900-1). He was at once assigned to the examination of the Southern Pacific Railroad Company's oil lands in California and in March, 1903, wrote the letter with which was enclosed the map in question. This map, introduced by appellants, delineates clearly the anticlinal structure of the lands in suit. Moreover, he told F. M. Anderson, another of appellants' geologists and witnesses, that he had been in the Elk Hills and that he recognized their anticlinal structure (R. 2598). He was well acquainted with it, according to his best friend, S. P. Wible (R. 321).

F. M. Anderson, just referred to, testified that the Elk Hills is rather a broad fold of dome-like character and that the anticline of the Elk Hills is a broader arch than that of the Buena Vista Hills (R. 2618); also, that an anticlinal structure is usually the most favorable for the reason that it facilitates the accumulation and retention of oil if the right stratigraphic and other conditions are present (R. 2623); further, that the general position and the general character of the Elk Hills had attracted his interest from the first (R. 2625).

W. H. Ochsner, another of appellants' geologists and experts, testified: "Where the anticline is as clearly defined as in the Elk Hills we have the elements of an ideal spot by an anticlinal structure."



(R. 2211). He stated also that the mere sight of the uplift there would arouse the suspicion of a competent geologist as to the oil-bearing character of the Elk Hills and that that suspicion would have been immediately aroused without any investigation. (R. 2212).

The record is replete with evidence of the anticlinal structure of the Elk Hills and, indeed, that such was their structure is not disputed by appellants. That their structure was known and recognized and that the significance of the structure was appreciated appears from the testimony of many witnesses.

S. G. Drouillard testified that their formation is exactly like that of the other oil country and that the anticline was found running parallel with McKittrick, northwest and southeast (R. 116-117) and in a direction which would take it generally through the center of the hills (R. 124).

L. G. Sarnow, who for years worked for appellants under their oil expert, J. B. Treadwell, and drilled for them thirty wells in the Kern River field and three in the McKittrick field (R. 133-4), testified that the formation of the Elk Hills is shale, gypsum and sand and is substantially the same as the formation of the eastern flank of the Temblor range (R. 134).

Ira M. Anderson, who had had many years' experience exploiting and developing oil territory and

had drilled in four or more states, examined the Kern River, Sunset, McKittrick and Midway fields and found them all about the same (R. 153-4). He examined the Elk Hills and found shale, gypsum and oil sand (R. 155) and an anticline running through the hills northwest and southeast (R. 160-1). There is quite a pronounced anticline near the town of McKittrick and to the south and west of it. It dips away from the town of McKittrick. (R. 162-3).

F. J. Sarnow drilled ten producing wells in the McKittrick field under Treadwell for appellants (R. 164-5). He stated that at the time of testifying he was drilling on section 6 of 30-22 on the same anticline that runs through the Elk Hills (see exhibit 157); that he had drilled three wells there and was working on the fourth; that he concluded that there is an anticline there because it runs from near Buena Vista Lake to thirty-five miles northwest of McKittrick. He said further that he had drilled six wells on that same anticline and that sometimes you don't see it for a couple of miles and then it crops up again with blow-outs of oil sand; that the anticline is an outcropping of oil sands and blow-outs and the formation surrounds it, the formation being shale, clay and gypsum; and that the oil sands show stratification from which you can determine that it is an anticline (R. 173-4).

M. S. Waggy was in the Elk Hills about 1900 and located for oil purposes in 30-23, recognizing the general trend of the ledge running through the hills and the formation pitching to the southwest con-

stituting an anticline running northwest and southwest (R. 179-80).

B. K. Lee, after mentioning many outcrops and seepages in the vicinity of McKittrick, stated that he noticed in 1900 evidences of an anticline in the railroad cut in section 14 of township 30-22 in the Elk Hills (R. 227) and later, starting from section 36 of 30-23, followed the anticline "right through from there to the cut and drove a team across, a distance of seven miles", finding and tracing without difficulty the pitch both to the north and south (R. 232).

S. P. Wible was familiar with the Elk Hills since 1893. He had drilled many wells and had had long experience in the oil business (R. 318). He stated that there is an anticline in the Elk Hills which could be detected in the canyon in a number of sections, in a dozen different places, just north of the apex of the hills; that it is very well defined in section 14 of 30-22 just at the northeast end of the Elk Hills in the railroad cut and that this is a continuation of the anticline running northwest and southeast through the Elk Hills which can be followed over the hills to the southeast; and that Josiah Owen, geologist of the Southern Pacific Company whom he knew well, was acquainted with it (R. 320-1). He further testified that before 1904 there were two oil wells on section 6 of 30-22 and one on section 1 of 30-21, and three on the same anticline which runs through the Elk Hills (R. 321). (The record says section 1 of 30-22 by mistake). He stated that the formation of 30-23 and 30-24 consisted of shale, sandstone, clay,

fullers-earth and gypsum, fullers-earth, gypsum and oil usually occurring in conjunction (R. 322).

H. P. Dover started in the oil business in 1901 and had been in it constantly. He did not find quite as much shale in the Elk Hills as in the Midway, but the formation is favorable for oil (R. 463).

Colon F. Whittier, who had been in the oil business fourteen years and produced a million barrels a year, first went to McKittrick in 1902. (R. 469). He knew the Elk Hills and stated that the anticline running through them is sufficiently marked to be seen from the train as it goes through the cut in section 14 of 30-22 (R. 469).

Frank Barrett had had practical experience in the oil business well-nigh all his life. He first went into the Coalinga field in 1895 and brought in the first paying well in that field. He visited the Elk Hills in 1899 and went through them on a tour of investigation (R. 479). He noticed very pronounced indications of anticlines in the Elk Hills and did not think the characteristics of the formation at all dissimilar to the formation around McKittrick, Taft and Maricopa (R. 480).

Chas. W. Lamont, also an experienced oil man (R. 580), was in the Elk Hills in 1899 and concluded that section 32 of 30-24 was the top of the anticline and at that time took section 14 of 30-22 to be the west end of the anticline (R. 581).



F. O. Martin, an expert engineer, geologist and mineralogist (R. 609-10), described the Elk Hills as an anticlinorium, meaning thereby an anticlinal ridge with a major anticline and smaller wrinkles or folds running parallel or nearly so to the main ridge, whose topography bears a close resemblance to the geological structure (R. 612). There is evidence on the surface that the conditions in the hills are practically the same as when first uplifted and they were practically the same in 1903 as in 1910.

John Lang, a witness for appellants, thought that the anticline in the Elk Hills runs from northwest to southeast and had seen outcroppings of it in section 14 of 30-22 and noticed the anticlinal fold there. He had observed the broken and smashed conditions around McKittrick that had resulted from disturbances and that there was no evidence of such disturbances in the Elk Hills (R. 1969-70).

Samuel Shannon, called by appellants, who had made in 1909 locations in the Elk Hills on which he had spent eight or nine thousand dollars (R. 2140-1), described them as having pretty much the same characteristics as the Buena Vista Hills, admittedly productive oil territory (R. 2143).

Other witnesses to the same effect might be quoted; but enough has been shown to prove the anticlinal structure of the lands in suit. As already indicated, this is not disputed by appellants.

(b) *The significance of anticlinal structure.*

This subject may be dismissed with a few words—not, however, because unimportant, but because not a subject of controversy. The testimony of two government experts and that of an appellants' expert will suffice.

F. Oskar Martin stated, in effect, that the most favorable indication of the oil character of lands is anticlinal structure and that it is a well known fact that along the summits of anticlines oil tends to accumulate and that these summits are the most favorable spots for such accumulation (R. 613).

F. M. Anderson, a geologist and expert witness of appellants, gave the following testimony:

“A. The outcrop of oil sands, of course, taken in connection with the dip and strike of the same and the general appearance of the sand and the overlying strata, is one of the most favorable; and the occurrence of asphaltum, oil springs and seepages and so forth, taken in connection with other things, is a very favorable indication.

“Q. Structure?

“A. And structure.

“Q. What sort of structure would you regard as favorable?

“A. Usually an anticlinal structure is the most favorable.

“Q. And why is that so?

“A. It facilitates the accumulation and re-

tention of oil if the right stratigraphic conditions and other conditions are present."

(R. 2622-3).

There is no controversy here or elsewhere as to the proposition that the geological structure most favorable to the accumulation and retention of oil is the anticlinal. The commerical oil of to-day is oil that has accumulated and been stored in past ages in nature's anticlinal reservoirs. Accordingly, in exploring for a present supply the skilled oil man directs his attention to the natural reservoirs of oil found in anticlinal structures. This is what the several witnesses whose testimony has been recited had in mind when speaking of the anticlinal structure of the lands in suit.

Nor is there controversy that the Elk Hills, including the lands in suit, were and are structurally ideal reservoirs for the accumulation and retention of oil. Exhibit 157, appellants' own evidence, shows clearly the anticlinal structure of the lands in suit and Veatch testified that these lands lie on both sides of the summit of the hills (690), Dr. Branner adding that the general structure was perfectly simple and the conditions for the accumulation of oil favorable along certain folds that were easily seen by any geologist (R. 1003). That this was one of the *known conditions* appears not only from the evidence already recited, but follows of necessity from the fact that it was so conspicuous that it could be plainly seen from McKittrick (S. P. Wible, R. 320), as also from

the railroad cars as they passed through from Bakersfield to McKittrick and, of course, returning (C. F. Whittier, R. 469).

Finally, according to Dr. Branner, the general structure of the Elk Hills is so favorable to the accumulation of oil in that region that, even if drilling had gone to five thousand feet and not found oil, he would yet advise a company to not give up hope of finding it (R. 1008).

(c) *Relation of accumulation to structure.*

Oil does not as a rule remain in the place where it is found. It passes out into an absorbing bed where it accumulates. Hence the necessity of favorable structure. It is formed by the death of myriads of small marine infusoria called diatoms; but its accumulation depends upon the nature of the beds into which it passes. (Dr. Branner, R. 1011). As will more fully hereinafter appear, even though the oil be formed in abundant quantity and the porous beds be at hand, unless the structure of the beds is such as to retain the oil as it passes into them, there is no retention, but infinite dissipation. Hence the necessity of the anticlinal structure in which to trap and confine the migrating oil (R. 1011, 1016-17).

2. FAVORABLE SITUATION OF THE LANDS IN SUIT WITH REFERENCE TO THE SOURCE OF OIL.

The record exhibits unanimous agreement that the accepted source of the oil in the California fields is shales. Dr. Branner lays this down categorically



(R. 1010-11). He testified that the oil in the California fields originally developed from a series of beds designated by geologists as "Monterey shales"—a series of rocks made up of the skeletons of diatoms that have accumulated in infinite quantities, especially about the southern end of the San Joaquin Valley, the name "Monterey shales" being local and given because rocks of the same age and general character occur at Monterey, California (R. 1008-9). He explained that diatoms float near the surface of the water while alive and, upon dying, sink wherever they are, whether in shallow or deep water. In the case of marine deposits, he said, these currents sweep down from the north and have been pouring in for millions of years from the same source and accumulating where the coastal conditions were favorable. Further explaining that it would be erroneous to attribute all of the oil to the "Monterey shales", he stated that, in looking over lands that he had been called upon to examine for petroleum, he searched for these diatomaceous shales and, because of the enormous period of time during which they had been accumulating, these diatoms were not associated exclusively with "Monterey shales" nor their accumulations confined to the period during which these specific shales were being heaped up; so that, wherever he had found marine diatoms accumulated in considerable quantities, whether in the Monterey or other shales, he considered that there was a legitimate place to look for petroleum (R. 1009-10-11).

Dr. Branner further testified that at the southern end of the San Joaquin valley these diatomaceous shales have a thickness of five thousand feet and that such a great thickness would immediately make a competent geologist prick up his ears and say: "Here is a chance for an enormous accumulation of oil." (R. 1012-13). With reference to the Elk Hills he stated that their general geology would lead him to infer that diatomaceous shale was under them and in great thickness (R. 1020). They are situated, he said, "right about in front of the thick portions of these Monterey shales. The thickest parts, beginning up here some way north of McKittrick, come—oh, perhaps, twenty miles or more or so northwest of McKittrick and from there down to the vicinity of Maricopa is the very area in which these shales have those great thicknesses; and these Buena Vista Hills and Elk Hills lie right off towards the east, northeast, of those hills." (R. 1022). It seemed to him that the best chances for oil in the whole of that region, in which were some of the greatest oil fields in the world, were in the Elk Hills and Buena Vista Hills (R. 1024). It will be borne in mind that Dr. Branner stated that these conditions were such as to "make any competent geologist prick up his ears" and that one who did not recognize the structure, etc., was not competent. This is especially relevant and pointed in view of the presence and work of appellants' geologists and oil experts, Dumble, Owen, F. M. Anderson, Treadwell and others in the region of the lands in suit prior to patent, of which more will be said later.

F. M. Anderson, upon whose testimony appellants rely most strongly, admitted that the Elk Hills, lying out some distance from the line of outcrop, are in a favorable place for the thickening of the diatomaceous beds which are supposed to be the origin of oil (R. 2627).

Thus it appears from the testimony of the government's most eminent expert and that of appellants' geologist and most prominent expert, who was in their service before patent, that the lands in suit are most favorably situated with reference to the source of the oil which has made the region round about one of the richest and most famous oil fields in the world; and their testimony upon this point stands uncontradicted and unquestioned upon this record. It necessarily follows that this favorable situation was one of the known conditions prior to patent. It is recognized now at a glance and is affirmatively shown to have been known by at least one of appellants' experts who will be shown later to have been busying themselves prior to patent with minute investigation and examination of these and neighboring lands.

### 3. EVIDENCES OF OIL IN THE ELK HILLS.

#### (a) *Introductory:*

The favorable structure of the lands in suit and their favorable situation with reference to the source of oil have been shown. It is now proposed to recite the testimony relating to the actual existence prior to patent of known evidences of oil in the Elk Hills.

Dr. Branner indicated very clearly that evidence of the actual presence of oil upon the land is by no means necessary to the determination that it is oil land. He saw the seepage hereinafter referred to on section 32 of township 30-24, but apart from it he felt confident of the importance of the lands for oil and his experience with oil had been that, if you have an oil-yielding horizon or bed covered over with a thick impervious stratum, it may happen that the evidences of oil itself will never come to the surface; so that you could, in a region that was otherwise favorable, advise companies to put their wells down absolutely regardless of whether there is a seepage or not. If he found the seepage there he would, as he did in this case, regard it as confirmatory of the other things (R. 1015).

It has already been shown that he testified that a geologist, who in 1900, 1901 or 1902 saw the seepages and asphalt around McKittrick and the wells which had then been drilled and who made some examination of the structural formation of the Elk Hills and failed to form an opinion that they were oil in character and that there was an oil bearing zone under them did not understand his business (R. 1004). It is noteworthy that the elements stated do not include evidence of the actual presence of oil in the hills.

There is no suggestion that the expert, trained geologists of appellants who during the period in question were exploring these lands before patent did not understand their business. The record will be invoked later to show that they did and that they



came to the conclusion reached by Dr. Branner that these lands were oil lands.

(b) *Seepages, gas blow-outs, asphaltum, brea and oil-sands.*

The record contains evidence of the presence of oil sands, seepages and gas blow-outs in the Elk Hills and in the immediate vicinity of the lands in suit. Dr. Branner himself said that he visited the hills in 1911 and that "near the middle of the north-west quarter of section 32 of 30-24, about on an anticline, are oil seeps" and that this "seepage was important as an indication of what was underneath." (R. 1015). He made no test of it on that occasion; but it is hardly to be assumed that he could have been mistaken as to what he saw. He was so positive in his estimate of the oil character of the lands, based on favorable structure and situation with reference to the known presence of oil, that he felt no need of confirmation.

Jno. R. Scupham, who was consulting engineer to the directors of the Southern Pacific Railroad Company, in 1887 saw the seepage in 32 of 30-24. He testified that it was a fresh seepage and that such indication could not be found in an exhausted oil sand; that it was an active seepage was not visible to the unassisted eye, but it showed freshness of the outflow of oil. The stain was a fresh stain. He could not detect actual oil, but the stain was necessarily recent—there had not been a complete evaporation of it. (R. 597).

S. G. Drouillard, whose experience and qualifications as a practical oil man are set out on page 114 of the record, located land in 1899 in the Midway, Temblor, McKittrick, the Buena Vista Hills and the Elk Hills (R. 114-5). He had seen oil outcroppings or seepages on section 15 of 30-24, the township next east of the lands in suit. It was quite a belt of sand cropping (R. 114). On the strength of these seeps he and his associates located the land. He had seen an oil seep in section 32 of 20-24 in 1874. *The sand at that time was wet with oil.* It would adhere to the hand when squeezed and there was a prominent smell of gas. He found other seeps north and west that he with his instrument compared with that in 32 of 30-24, finding that it would hit the Elk Hills. He supposed it was an anticline running southeast and northwest and parallel with McKittrick. When he in 1899 visited the seepage in 32 of 30-24 with his associate, Chas. W. Lamont, the sand was dry. The formation was exactly like the balance of the country that had oil in it and the land was regarded by him and by people generally as oil land (R. 116-7). After 1874 he visited the seepage in 32 of 30-24 "once in a while" when riding range, the seepage remaining in the same condition; but in 1899 it was dry. He dug about two feet into it and found the same sticky stuff observed in 1874 (R. 121-2). He showed W. E. Youle some of this sand and he pronounced it oil sand (R. 122-3). He located the land because of this seepage and regarded it as oil territory. He found the anticline on section

5 of 30-22 north of McKittrick and an oil sand cropping (R. 115, 123).

John Jean in 1899 went with Chas. W. Lamont to the seepage in 32 of 30-24 and found a black, coarse sand—dry oil. The depth was about three feet and about one hundred feet long and broad. It looked like dry oil, burnt sand. He reported this to J. B. Treadwell, oil expert of the Southern Pacific Company (R. 128), who accompanied him to see it, examined it and said “it looked good” (R. 127-8). W. E. Youle told him that from the Buena Vista Lake through the hills to the other hills where McKittrick is and from Sunset north to McKittrick through that flat there was oil; and that, “if you go into the Elk Hills, you will find oil anywhere north of the line between Sunset and McKittrick.”

L. G. Sarnow had worked for appellants under Treadwell, their oil expert, in the Kern River field and at McKittrick in 1899 and thereafter as a driller and in charge of the field, drilling for them thirty wells in Kern River and three at McKittrick (R. 133-4). He had been in the Elk Hills and located land there. The formation is substantially the same as that over on the eastern flank of the Temblor Range, shale, gypsum, and sand. (R. 134-5). Having been shown some sand from 32 of 30-24 by John Jean, he, Jean and Treadwell went to the place from which it was taken which was apparently a blow-out, there being an “anticline that came to the surface in a way—it was just the same as you would

find in Temblor". He said that Treadwell was a mineralogist and thought "it was good for oil". On the strength of that showing Treadwell, Jean and he located the land. "With reference to that oil sand", he said, "we did not locate just on the sand. I remember the sand was on one side of it and we seemed to figure that it came from McKittrick or Temblor and we took the land that we thought would be on the strike" (R. 135-6). He made no test of this sand, but did not need to. It was oil and he did not think he could have been mistaken (R. 141-2).

F. D. Lowe in 1900 had heard of the discovery of oil evidences in the Elk Hills—had heard some people speak of the gas blow out in 32 of 30-24. He, with associates, went in in the latter part of 1900 and looked carefully over the land for anything that indicated an outcropping of oil sand. He found evidences three hundred yards due north of the northeast corner of section 11 of 31-24—what looked like oil sand in a gulch. He found another similar place at the centre of section 2 of the same township (R. 145-6). He found still another indication half a mile east of the section line of section 2. He said: "These oil sands showed stains and looked as though they were very much dried." He and his associates made locations of section 10 and others in January, 1901; incorporated into a company, levied an assessment, erected an eighty foot derrick and let a contract for drilling, the derrick being erected at the **northeast corner of section 11 of township 31-24**, about the place where he made the first discovery.



Drilling progressed to five hundred and sixty feet at which point a small showing of oil was discovered. At various times gas was found, which was piped and used for cooking purposes. The formation was identically like that he had seen in the Kern River field just before striking oil, the witness having been present at the drilling of many successful producing wells in that field (R. 146-7). At the indicated depth drilling ceased "because there was such a general depression and oil got to be a drug on the market that we couldn't see our way clear to continuing the work." In addition he and his associates were greatly embarrassed financially (R. 147-8). He was certain that the well on section 11 of 31-24 found oil. "When the bit would come up, little drips of oil would break and run down in a streak. I am certain that it was oil", he said (R. 150). At five hundred feet, when gas was encountered, they lit a paper and dropped it down the casing and, when it had gone down a few feet, there was a terrific explosion (R. 153).

Ira M. Anderson (experience and qualifications R. 153-4), had found shale, gypsum and oil sands in the Elk Hills (R. 155). He found brea in the fields in the Elk Hills. He made chloroform tests of the earth and rock and shales found in the Elk Hills which showed oil. Quoting from the record: "As to my opinion as to whether or not the Elk Hills was oil producing territory, the formation was there to show that it was. The shale is there, the clay is there and the oil sand is there. I found blow-outs

in the Elk Hills. There was a place across from Miller & Lux' headquarters where the gas blew out"—eight or nine miles south and west from the headquarters, on the east side of the summit line of the Elk Hills, pretty near the top of the ridge (R. 156).

Chas. H. Allison, appellants' witness, corroborated the testimony of F. D. Lowe that he found gas in his well in the Elk Hills, Allison having furnished him with a gas-head with which to retain the gas and pipe it to the cook shanty (R. 2002).

David Kinsey, another of appellants' witnesses, also corroborated Allison both as to the finding of gas and as to the cause of the cessation of work (R. 1801).

F. J. Sarnow (R. 164) had seen oil crops and sand in the Elk Hills on section 14 of 30-22 on the east side of the railroad and dry oil and overflow on the west side of the wagon road. At other places he saw several different spots where there were oil crops—four or five outcroppings of sands in the Elk Hills. He knew of oil sands in the hills southwest of Miller & Lux' ranch about section 25 of 30-23 and section 30 of 30-24 (R. 169). The anticline that runs through the Elk Hills is that which goes through section 6 of 30-22 on which section he had drilled three producing wells (R. 173-4).

M. S. Waggy located lands for oil in the Elk Hills in 1899-1900. He found in section 32 of 30-24 dead sand that had the odor of oil. It was oil sand

stained black (R. 175-6). He located lands in 30-23 and in 30-24. He used to throw on the fire the deposit that he found there which, when it became heated, would blaze up and give an odor of oil or gas (R. 177-8). Near his locations in the Elk Hills shafts were later on dug by other parties twenty feet which exposed indications of oil (R. 178). Witness regarded the Elk Hills as oil territory because they contained better indications than the Kern River field, where they were then getting oil (R. 180). There was an outcropping on section 26 of 30-23 (R. 181).

B. K. Lee (qualifications, R. 224) found asphalt on section 11 of 30-22, saying that on the north flank of the anticline on this section there is a bed of coarse gravel and that, while a superficial examination showed nothing but yellow gravel, yet, when it was broken into, it was found covered with dry oil. He also found an oil seepage on section 2 of 31-23 (R. 225).

J. I. Waggy and associates made locations prior to patent "all over the Elk Hills" in 30-23, 31-23 and 31-24 (R. 238-9). In 1900 he discovered in a canyon in the Elk Hills a seepage that seemed to be an oil seepage, very much like the seepages he had seen in the Sunset district. He made his discovery known to H. A. Blodgett, of the firm of Jewett & Blodgett, large oil and asphalt operators, who sent their superintendent, W. E. Youle, with the witness to examine it. This seepage was on section 32 of 30-24 and on the

strength of it witness in conjunction with Jewett and Blodgett located the land (R. 242), the locations including the top of the Elk Hills and extending as far west from 32 of 30-24 as the Elk Hills themselves extended (R. 243-4). These locations were kept up for several years (R. 253-255). Relocations were made and, says the witness, "we had to go out there at 12 o'clock at night and lay in the sage-brush and pretty near freeze to death 'till 12 o'clock and then see if we could beat the other fellow to it." (R. 254). He had not renewed the location since the lands were withdrawn September 27, 1909 (R. 255).

S. P. Wible before patent heard of the seepage on 32 of 30-23, but did not see it until afterwards. He said: "It is not what you call an oil seepage; it is what you would call a brea bed. Evidently oil or gas had been in it at one time and dried out at the present time." (R. 318-19). He stated that all the south half of 30-23, the specific lands in suit, lie in the Elk Hills right over the crest and west of the oil croppings in 32 of 30-24 (R. 320). He further testified that there is a decided oil showing in what he would call the north extension of the Elk Hills beyond the railroad to the west, consisting of "oil sand crops in a number of places" and that as early as 1901 and before 1903 there were two oil wells on section 6 of 30-22 and one on section 1 of 30-21, these wells being on the Elk Hills anticline. (See exhibit 157).



Charles Brisco (R. 334-5) about 1901 or 1902 found a small brea bed—dried oil—dried asphaltum—in the Elk Hills on the east slope about twelve or fifteen miles south and east of McKittrick. He reported it to several people and prior to 1904 took Josiah Owen, appellants' geologist, to see it (R. 335). It consisted of dry dirt and asphaltum mixed together and would burn. Owen explained to him that it was a fissure that had been blown out there. There was dried oil there—that is, it was dried in the dirt and shale (R. 339-40). Owen said to him: "This is good enough, my boy; hang on to it." (R. 341). The witness' experience had been that, when you find brea, "it is an indication that there is an oil belt there or near there somewhere and it has been oozed out there by the gas". (R. 341). He believed oil to be in the Elk Hills "by reason of the contiguity to proven territory." (R. 342).

W. G. Sylvester in 1899 found evidence of oil in the Elk Hills. His party was out to locate oil lands and started from the Headquarters Ranch. They had gone into the hills several miles when he saw indications of what he would call asphaltum, though he did not remember on what section. It was possibly four or five miles west and possibly a little south of Headquarter's Ranch. He found a rather recent oil seepage which was somewhat dried out, but would burn, giving off an odor like coal oil or gasoline. He found this seepage in a gulch and also found asphalt high up on the hills (R. 355-6). His party made many locations in 30-23, 30-24, 31-23

and 31-24. In 1901 the Empire Oil & Development Company, of which this witness was the heaviest owner, drilled a well on section 8 of 30-23 to a depth of 980 feet. That well was abandoned in 1901 because there was so much gas that the drilling became so expensive that they "couldn't stand the pressure and had to quit" (R. 356-7-8).

J. W. Kaerth assisted in the government survey of 30-23, the camp being on section 33. He found asphaltum reefs which showed up along the summit in a number of places. His party removed some portions of these reefs and came to do this in the following way: they wanted rocks with which to mark corners and, thinking these reefs rock ledges, sent the camp man out to get some of them. When he came back, he reported that they were not rocks at all, but tar. The witness then examined and found they were cakes of asphalt. The party thereafter used it for camp fuel (R. 417-8). He remembered two or three oil seepages on the lands—what appeared to be oil seepages (R. 418). In the report of the survey the lands were characterized as mineral, such characterization being based upon what was seen, viz., the asphaltum reefs and oil seeps (R. 423).

H. P. Dover in 1903 or 1904 found "a kind of a blow-out in a large gulch" in 30-23 "which showed indications of oil on both sides"—discolored clay and some sand. In his opinion it showed a stain of oil. He detected oil "a little with ether." This was in

the Elk Hills, he was positive. The formation he thought favorable for oil (R. 461). In 1903 or 1904 he went into the Elk Hills for the purpose of locating oil lands; but he had been in there on numerous occasions before that—he had worked stock there for Miller & Lux (R. 463). The little seepage in section 23 of 32-23, which he first saw in 1901, “was not like the seepage in 32 in the Elk Hills. There was oil in 32 oozing out of the ground.” (R. 467).

Colon F. Whittier (for qualifications and experience see R. 469) testified that there is asphaltum showing in the railroad gap—section 14 of 30-22—, some oil sands—dry oil. The shales around McKittrick and those in the Elk Hills are practically the same (R. 469).

Charles F. Haberkern knew of and visited the oil showing or outcrop on 32 of 30-24 in 1904 and it looked good enough to cause him to locate the land there (R. 350).

Frank Barrett (for qualifications and experience see R. 478-9) first visited the Elk Hills in 1899 and found two or three places where there had been seepages. He took some of the outcroppings home with him. From the smell one could just get a little odor of oil; but, when he applied the chloroform test, he got traces of oil. It was not asphaltum—it was oil. He would not be positive, but thought it was section 17 of 30-24. It was in 30-24 near section 23. He found the formation in the Elk Hills, around McKittrick and at Taft and Maricopa

similar (R. 479-80). He believed the lands in suit reasonably worth \$200.00 to \$300.00 an acre as oil lands (R. 481). He found some three or four seepages where oil had seeped out and caked. All of the lighter properties, of course, had evaporated. There was one blow-out that he saw that was a live seepage with actual oil coming out of it. It was not in the Buena Vista Hills—it was in the Elk Hills (R. 483).

N. C. Farnum (R. 493) made a detailed examination of the Elk Hills in 1899. He rode over “the whole hills” pretty thoroughly, making a very thorough investigation looking for oil sands that might crop out or gypsum—anything in the way of material upon which to base a location. He went to a place indicated by his guide which he later found was section 32 of 30-24. There he found evidence enough that “there had some time been some oil in this piece of ground on the surface.” It was in a canyon and extended quite a distance down the canyon from what is often termed the blowout or gas fissure (R. 494-5). The witness tested the sand and found that it had been saturated with oil (R. 496). He found evidence of waste oil in the railroad gap in 14 of 30-22—dry oil in the sand (R. 496).

Parker Barrett (R. 523), who located the ground on which the famous Lake View gusher was drilled, as well as lands in the Elk Hills, knew of an oil seep in section 32 of 30-24 in those hills. That seepage assisted him to the conclusion that the lands were good oil lands, although he had determined that such



was the case before he visited it. He had heard of the seepage many years (R. 523-4) and had talked with geologists, including Fairbanks, Ochsner and Owen. He also testified to the presence in the railroad gap in section 14 of 30-22 in the Elk Hills of asphaltum beds or brea (R. 524-5).

F. Oskar Martin, an expert for the government, testified that he found an oil seepage on 32 of 30-24 situated near a point at which the anticline had been somewhat deflected, giving the hydrocarbons a chance to exude to the surface; and that the existence of that seepage was plain evidence to him that the lands must be underlaid by petroliferous deposits (R. 613).

W. E. Youle (qualifications and experience, pages of record 540-1-2-3-4) stands out upon this record as the practical oil man of the greatest experience and success of all the witnesses who were called. He saw oil sands in the Elk Hills in 1898 and made for his employers locations based upon his personal observation of the lands. He made chloroform and fire tests of the oil sands which he found in the Elk Hills and the result showed bituminous matter and gases. The land was full of gas. "It was burned with gas all over." This was evidence of a very volatile oil without much asphalt base (R. 551-2). (When, as will be shown later, a subsidiary of the Southern Pacific Company drilled wells in the Elk Hills, it found, as Youle had predicted, "a very volatile oil without much asphalt base"—indeed, oil of

the high gravity of 39 degrees Baume—a phenomenally light, volatile oil for California.) Youle saw oil sand near the summit of the Elk Hills. (R. 573). On two or three different days he got samples over a distance of a mile or more—got some in a gulch and some on the hills. He found no asphaltum, but sands percolated so much that you could put them on a fire shovel, heat them a little and they would blaze; and in making the chloroform test, you could get particles of oil. He stated emphatically that “you could get oil” from the territory he examined on those occasions (R. 574). He found through the Elk Hills many evidences of gas, shown by the peculiar look of formation that had been attacked by gas—a grayish color, a glassy appearance which manifests itself when gas is escaping. At one or two places over near the apex he put a can over it and let it accumulate and then lit it (R. 574-5). The gas did not come through water—that was evident. Its occurrence was an indication of oil. The gas which he found was not marsh gas (R. 575). He would have advised any company to spend one hundred thousand dollars to develop these lands and the only reason his employers did not do so was because of the scarcity of money, the low price of oil and lack of transportation facilities (R. 577).

Robt. E. Graham, a witness for appellants, had seen the deposit in 32 of 30-24 and, while he could not say what it was, said “there are two or three places dug out there and it looks as though it might have been at one time oil sand.” (R. 2135-6).

Chas. W. Lamont (qualifications and experience, pages 579-80 of the record) went in the Elk Hills in 1899 and located lands with Drouillard and others. They took up some of the shale and sand at the blow-out on 32 of 30-24—decomposed shale and oil sand, the shale being too hot to handle pleasantly. On the north and along the line of contact from Mc-Kittrick towards Sunset right close to the lake they saw live oil coming out of the ground, floating in the mud and water, towards the easterly and northerly end of the Elk Hills (R. 580-1). He also saw what looked like oil sand and brea on section 14 of 30-22 at the west end of the Elk Hills anticline (R. 581).

L. E. Doan, a witness for appellants, testified to out-croppings of oil sands on sections 26, 22, 16 and 15 of 30-23 extending three miles (R. 2074). He also went to the seepage on 32 of 30-24 in 1902 with Farnum (R. 2074).

As showing the general notoriety of the seepage on 32 of 30-24, the following evidence from appellants' own witnesses is referred to:

E. J. Miley testified that, while he had never seen the seepage in question, he had heard of it several times and as early as 1901 or 1902 (R. 1742).

Chas. H. Allison saw specimens of sand from out-croppings in 30-23 and believed in the oil character of the lands as prospects. Several of his co-locators went into the hills and, after examination, returned and brought with them and showed him numerous

specimens of bituminous rock and asphaltum which, when a match was applied, burned. The context shows that this was prior to 1904 (R. 2001-2).

R. K. Howk had heard of the gas blow out in the early days in the Elk Hills, but never went to see it (R. 1844).

B. M. Howe heard of an extensive oil outcropping or gas blow-out in section 32 of 30-24 (R. 1906).

Chas. T. Burks heard of it (R. 2067).

Now, it is true that three of appellants' experts, Ochsner, Anderson and Taff, all in their employ as geologists, expressed the opinion that the outcropping of sand or seepage on 32 of 30-24 is not an oil seepage, Ochsner saying that he saw it in 1909 and that it was an occurrence of organic material (R. 2173), as if oil were not organic; but from the examination which he then made of them he concluded that the Elk Hills may have small scattering amounts of light oil. He did not burn any of it or test it with chloroform (R. 2215). He first formed an opinion of the Elk Hills as a possible or probable oil bearing territory as the result of his work in the fall of 1907 (R. 2203).

F. M. Anderson first saw the gas blow-out or seepage on 32 of 30-24 in November, 1912, when sent out to examine the lands in suit by way of preparation to testify as an expert in this case (R. 2589). His opinion was that it was a gas seepage—hydro-



carbon gas and partly sulphuretted hydrogen gas—methane or marsh gas (R. 2475-6). He said that he tested the sandy material with benzine, chloroform and other reagents (R. 2476-7) and reached the conclusion that the tests were entirely negative. He, therefore, expressed the opinion that the deposits were neither oil seepages nor asphaltum. Asked by counsel for appellee whether they were petroleum gas blow-outs, he answered: "I can't say that they are and I do not believe that they are"; thus refusing to commit himself to the proposition that they are not (R. 2478-9). This is particularly significant in view of the fact that he had already pronounced the deposit a hydrocarbon gas blow-out; for, as is well known, petroleum gas is a mixture of hydrocarbon gases.

J. A. Taff, while agreeing with Anderson in the main, disagreed with his view that this deposit was a gas blow-out (R. 2843-4). He admitted that he did not even know the formula for methane or marsh gas and that he was not a chemist (R. 2837). He did not know what ethane is nor propane nor whether they are constituents of petroleum; but stated that it was his understanding that methane or marsh gas constituted from seventy to ninety-eight per cent natural gas (R. 2837-8); so that Anderson's opinion that the gas in the seepage in question was methane (R. 2475) amounts to a practical admission that it was petroleum gas.

It is most manifest that the foregoing recital of the evidence concerning the existence in the Elk

Hills of evidences of oil is convincing that such evidences do exist and that they were generally known prior to the date of the assailed patent. Such men as Drouillard, Youle and others, practical and experienced as they were in all of the phases of the oil business, could not have been mistaken. They saw these evidences and handled and tested them. Dr. Branner could not have been "taken in" by them. When in 1874 Drouillard saw it, "the sand at that time was wet with oil", he declared. Youle and others, long before Anderson or Taff went near it, tested it with chloroform and found oil in it. From 1874 to Anderson's visit in 1912 thirty-eight years had gone by. Neither of them is shown or appears to be better qualified than Youle to make the chloroform test and their argumentative testimony throws no suspicion upon the accuracy of the tests that had been made by others or of the existence of the oil which they saw. Especially is this true in the light of the admission of Anderson, Taff and Ochsner that they conceded the presence in the Elk Hills of a light, volatile oil. This is the very kind of oil which Youle said he expected to find there and which was later found in the wells drilled by the Associated Oil Company, a subsidiary of the Southern Pacific Company. (Exhibits 9-D and 9-O).

Appellants extended themselves in vain to destroy the evidence of the existence of seepages and blow-outs in the lands in suit and immediately around them because of their recognition of the completion by it of the strict parallel between the facts of this

case and those of the Diamond Coal and Coke Company case. In the latter there were the outcrop on the one side, the dip away from it towards the lands in suit and the occurrence of coal on the other side of the lands. Here we have the long line of seepages and many wells to the west of the lands in suit, the dip of the oil strata towards the lands in suit and the proven presence of oil on the other side of the lands. The known conditions in the one case are therefore *in pari passu* with the known conditions in the other. Indeed, while the seepage in 32 of 30-24 is beyond the lands in suit, the foregoing evidence proves the existence on the lands themselves of brea, asphaltum and gas blow-outs, so that this is a plainer case than the Diamond Coal and Coke Company case, since there there was no evidence whatever of an exposure of coal on the lands in suit.

If, therefore, the question were now of first impression and for this court initially to pass on, the evidence is overwhelming that there were generally known seepages, gas blow-outs, brea and asphaltum in the Elk Hills. Since it has already been resolved by the trial court in favor of the government, it would be difficult to conceive upon what principle appellants can now urge that Judge Bean's finding is without substantial support in the evidence or that it is palpably or manifestly wrong.

The Government's expert, Veatch, said the last word upon this subject. He testified with reference to the seepage of 32 of 30-24 that he examined it twice and found a stained sand exposed at intervals

for several hundred feet. This sand contains some sulphur. Tested with chloroform it gave no oil. The sand shows particles of carbon and it was his conclusion that it represents an escape of gas from the oil bearing zone, the gas carrying some oil with it; that this oil has been deposited in the sand together with sulphur coming from the gas and has been fired—the gas has been lighted—; and that, owing to incomplete combustion, a little carbon has been left in the sand, this fact making it probable that any one or more persons in the past could have tested it and gotten positive results of oil before it was burned out. It was probably, he said, a volatile oil (in which he agrees with Anderson, Oschner, Taff and Youle) that would evaporate. If there were other earth movements, it would be possible to get a positive test of oil (R. 712-3).

Thus, Veatch agrees with Anderson, Oschner and Taff that there is no oil there now and explains how its absence now is reconcilable with its presence when Drouillard and Youle tested it and found oil. The evidence shows that it was frequently set on fire by persons examining it, thus explaining the cause, while the presence of the particles of carbon demonstrates the result.

(c) *The significance of seepages, asphaltum, brea and blow-outs.*

The presence of seepages, asphalt, brea and gas blowouts needs little comment. Their significance is patent. They do no less than prove the presence in



the lands in suit of oil. W. E. Youle foreclosed this question in these words:

“You show me an oil seepage with a proper development and I will show you an oil field; and, if you can find any instance it is not so, it is something I don’t know of. From my experience in the California fields, I will say that such an oil sand indication is always an indication of the presence of oil in paying quantities. I make this statement unqualifiedly and I know of no exception to it whatever” (R. 556).

Even if it were conceded for purposes of argument that all of the many witnesses who testified that they tested the deposit in 32 of 30-24 and found oil were mistaken and that the tests made by Anderson and Oschner in 1912 proved not only that there was no oil there then but that none had ever been there, it would none the less remain that in 1904, prior to patent, this was generally regarded as an oil seepage and hence an evidence of the presence of oil in which many experienced oil men, including Youle, the principal expert of that day, and Blodgett, the largest operator at that time, and even Josiah Owen, appellants’ own trained, experienced geologist, believed and upon which they relied to the extent that on account of it they made locations. This being true, it must be conceded that it constituted one of the “Known Conditions” which appellants were under the duty of considering; and that they had notice of it and believed in it follows from what has been shown concerning the examination of it by Owen and his estimate of it. If Owen believed it proof of the presence of oil, it was appellants’ duty

to make this known to the Government and their failure to do so can only be explained upon the theory that they knew that to do so would defeat their purpose to obtain patent to the lands in suit. Undoubtedly the seepage of 32 of 30-24 and in 14 of 30-22 were a part of the "known conditions" which were such as to engender and did engender the belief that these lands were oil lands; and, while the Government is far from conceding that the overwhelming evidence of their true character as oil seepages is even questionable, as elements of the "known conditions" at the time of patent nothing would be taken from either their significance or probative force upon the question of fraud if it were to be now demonstrated that the many witnesses were deceived. If partly on account of their reliance or belief in these then accepted evidences of the oil character of the lands appellants fraudulently sought and acquired patent to lands interdicted by the terms of the grant, it does not lie in their mouth to say now that they were mistaken and that, being mistaken, they ought not to be penalized for their successful fraud. Can it be doubted that, if instead of filing an affidavit that the lands were non-mineral agricultural lands, they had made known to the government their belief and the general belief in the existence in the Elk Hills of oil seepages or oil sands, no patent would have issued and the occasion for this suit never have arisen?

Finally, appellants' leading expert, F. M. Anderson, though he did not see this seepage until 1911,

saw and examined in 1903 and 1908 a similar deposit in the Buena Vista Hills and at both times believed and reported it to be asphaltum. These deposits in the Buena Vista Hills, he stated, differed from that in 32 of 30-24 in the Elk Hills "chiefly in quantity and magnitude of outcrop"; so that it follows that, if in 1903 or even as late as 1908 he had seen the seepage in 32 of 30-24, he would have taken it to be asphaltum (R. 2478-9).

(d) *The significance of oil sands.*

Said appellants' expert and geologist, Oschner:

"A cropping of oil-sand is a beginning of first-hand evidence that petroleum is present in the neighborhood and it is the first step in the study. It would call forth the first suspicion, the first interest. A cropping of oil sand which shows unmistakable evidence of having been impregnated by petroleum or bituminous matter is absolute evidence to the mind of any competent geologist that, if oil does not exist in that formation now, it must have existed at some time in the past. That is unequivocally true." (R. 2212.)

Robert E. Graham, another of appellants' witnesses, a practical oil man, said that, if in the Elk Hills he had found well defined sand and taken that together with the natural geological structure of the hills, he would have regarded it as a good indication of oil territory. (R. 2136.)

E. W. Kay, yet another of appellants' witnesses, testified that in 1901 an outcropping of sand in the Elk Hills would have been a conclusive indication of the oil character of the land. (R. 2086.)

B. M. Howe, a witness for appellants, testified that, in passing on the question of whether given land was oil territory, he would look for outcroppings of sand (R. 1901-2).

W. E. Youle said: "In California the existence of oil sands is always a good indication of finding oil in paying quantities." (R. 556.)

And so the recital of the testimony might be prolonged to show the value and faith placed in the presence of oil sands as indicative of the oil character of lands. Since, however, there is no dissent upon this proposition, the government is content to rest upon what has already been cited from one of its own witnesses, Youle, and appellants' witnesses, Ochsner, Graham, Kay and Howe, it being merely illustrative of what is shown with great distinctness and in various ways by the record.

(e) *Knowledge of Treadwell and Owens.*

Finally, emphasis is placed upon the evidence showing knowledge of the existence of these oil indications of two of appellants' servants, Treadwell and Josiah Owen.

Treadwell from 1893 to 1903 had charge of the development and production of oil for appellants (R. 424). It was upon his recommendation that lands of the Southern Pacific Railroad Company were withheld and withdrawn from sale because of their oil character (R. 426-7). In 1900 and 1901 he



was "working up the McKittrick district, determining the strike of the anticlinal and the oil deposits on the outcrop" (R. 3420). He acted under the orders of H. E. Huntington, the direct representative of C. P. Huntington, Julius Kruttschnitt and E. H. Harriman (R. 424). John Jean reported to him the seepage in 32 of 30-24 and he and Treadwell, together with L. G. Sarnow, went to see it in 1899. Treadwell said it looked good and on the strength of it Treadwell, Sarnow, Jean and others located the land (R. 128), Treadwell admitting that he made out the notices and placed on them the names of himself and seven others, all save one of whom were related to him (R. 3426). He told F. J. Sarnow that he thought there was oil in the Elk Hills (R. 165) and admitted, when testifying, that he believed in 1899 that they were mineral lands. (R. 3427.)

Josiah Owen, who took charge of the field as geologist for appellants in 1903, spoke several times with S. P. Wible about the seepage in 32 of 30-24 (R. 321). Chas. Briscoe took him into the Elk Hills to a place where there was "oil oozed up and dried in the dirt and shale." Owen explained to him that it was "a fissure that had been blown out there". This was in 32 of 30-24. On this trip Owen told Briscoe that the "Elk Hills were good oil territory." (R. 340.) After he had seen this seepage he said to Briscoe: "This is good enough, my boy, hang on to it." (R. 341.)

Chas. F. Haberkern spent five days in the Elk Hills with Owen in 1904. Together they went all

over them from one side to the other on both sides of the slope. They went into 32-23 and visited the oil seep in 32 of 30-24. Later they located lands in 30-23, the even-numbered sections, Owen telling Haberkern not to locate the odd or railroad sections, since he, Owen, was working for the railroad (R. 350-1).

And so the evidence could be recited in great detail to show that Owen, not once, but many times was heard to speak of this seepage in 32 of 30-24.

Upon the record there is no room for doubt that the two employes of appellants whose duty it was to know whatever there was to be known concerning the oil conditions knew by actual sight and from conversation with others of the existence of outcrops of oil in the very midst of the lands in suit before patent and at the very time of patent; and it will hardly be disputed that, as a legal proposition, what they knew their employer knew or is to be held to have known. Citation of authorities upon so plain a question is not deemed necessary. Nor is it admitted by the government that it was under any duty or burden to show actual knowledge on the part of appellants; for, if the Southern Pacific Railroad Company had made the "careful examination" which in his affidavit Eberlein, its acting land agent, swore that he had caused to be made, and which it was its duty to make, there is no escape from the conviction that there would have resulted the ascertainment of so conspicuous and generally known

a fact as the presence in the Elk Hills of the most cogent evidences of the existence therein of oil.

4. **SEEPAGES, GAS BLOW-OUTS, ASPHALTUM, CROPPINGS AND OIL SANDS IN THE VICINITY OF THE LANDS IN SUIT.**

As in the Diamond Coal and Coke Company case the coal outcrop to the east and the fact that the rocks in which the outcrop was found were the coal bearing strata of the region were among the "known conditions" upon which the Supreme Court predicated the coal character of the lands there in suit, so in the instant case it is now proposed to show the existence of an analogous outcrop of oil bearing sands, seepages, etc., to the east of and around the lands here in suit and found in the rocks which are the oil bearing strata of the region here in question. The existence of these indicia of oil is not denied by appellants; but it is only proper that they be called to the attention of the Court and the evidence concerning them, their location and the notoriety attaching to them briefly reviewed.

The presence of appellants' oil experts and geologists in the region during 1903 and 1904, as well as before and after those years, is abundantly proven; so that it follows that what others know they themselves either knew or had opportunity to know, actual knowledge and opportunity of knowledge being, for the purposes of this case, in legal consequence the exact equivalent the one of the other. Treadwell, the oil expert of appellants who preceded Dumble, Dumble himself, Owen and Anderson were

frequently in and around McKittrick prior to patent. This is not denied by appellants and to cite the many passages in the record which prove it would be a waste of time.

Since, in reviewing the evidence upon this topic, frequent reference will be made to certain towns in the oil territory on the west side of the San Joaquin valley, the location of each of them and the distance from the lands in suit are given:

McKittrick, formerly called Asphalto, is in section 21 of 30-22, Mount Diablo Base and Meridian, four miles from the lands in suit.

Fellows is in section 31 of 31-23, Mount Diablo Base and Meridian, six miles from the lands in suit.

Taft is in section 13 of 32-23, Mount Diablo Base and Meridian, nine miles from the lands in suit.

Maricopa is in section 2 of 11-24, San Bernardino Base and Meridian, twelve miles from the lands in suit.

Sunset is in section 13 of 11-24, San Bernardino Base and Meridian, fifteen miles from the lands in suit.

The evidence now under review relates in each instance to a period prior to the date of the assailed patent and to information and knowledge possessed by the witnesses at that time. Time geologically is reckoned by periods—not by years. It is obvious



that seepages and other indications of oil which existed in 1904 had been present for thousands, perhaps millions, of years. No reference is made to seepages discovered since patent. All the recited testimony relates to knowledge gained and things seen by witnesses prior to December 12, 1904, the date of the patent. There is, in fact, no evidence of the discovery since the patent of additional seepages, etc. All of them were known and were notorious before patent.

Since it is both logical and convenient to do so, the seepages, etc., are grouped by townships:

*Township 30-21:*

In section 12 of this township, six miles from the lands in suit, is the tar spring referred to by B. K. Lee (R. 224). Silas Drouillard referred to this spring as the Bond Spring, the tar of which was used in doctoring stock as far back as 1874 (R. 115, 118).

*Township 30-22:*

This is the township in which McKittrick, which was formerly and at the time of patent known as Asphalto, is situated. It immediately adjoins the lands in suit on the west and the large seepages which occur along the folded structure south and west of the town are described by many witnesses.

H. M. Shreve, who first came to this locality in 1888, testified: "In various portions of 30-22 in the

immediate vicinity of McKittrick there are large showings of liquid asphaltum oozing from the ground" (R. 455).

Chas. Briscoe, who first went to McKittrick in 1897 and remained there until August, 1904, testified:

"I know about oil seepages or oil indications in and about the town of McKittrick and the hills there. These indications consisted of oil running out of the ground and seeping and gas pockets and places where the gas was bubbling up. When it would rain the gas would bubble up and oil would run out down the hill. I guess I noticed this around there in a hundred places. I also noticed evidences of the waste of oil there in former times. There was what we called a tar flat. We never did anything with that tar flat because in the summer time you could hardly get across it and dogs and squirrels and everything would get stuck in it. This tar flat was about a half mile south and east of McKittrick." (R. 335.)

These are likewise described by F. J. Sarnow (R. 169); Ira M. Anderson (R. 155, 161-2); John Jean (R. 131); H. A. Blodgett (R. 261-2-3); W. E. Youle (R. 545).

Anderson on page 155 described the conditions and states that they were "known in general to the populace around there at that time. It was a matter of common notoriety". On pages 161 and 162 he states that about a mile from McKittrick the flat is "all covered with asphaltum".

In this same township Silas Drouillard described

oil sand cropping in section 5 (R. 127); and B. K. Lee, in sections 8, 17, 18, 20, 28, 29, 34 and 35 (R. 224-5).

The seepage near the railroad track in section 14, which lies on the axis of the Elk Hills anticline, was mentioned by Ira M. Anderson (R. 163); Colon F. Whittier (R. 469); N. C. Farnum (R. 496); F. J. Sarnow (R. 169), and B. K. Lee (R. 225, 230). C. W. Lamont (R. 581), Ira M. Anderson (R. 163) and N. C. Farnum (R. 516) fixed this seepage at some distance from the railroad tracks in the hills. S. P. Wible refers to seepages in a number of places west of the railroad tracks including sections 15 to 17 of this township (R. 321).

S. P. Wible testified that in 1903, a year before patent, he told Professor Owen, geologist of appellants, about these seepages and that Professor Owen said that he had found them and others as well (R. 321). Professor Owen, as elsewhere noted, was a geologist at that time in the employ of the Southren Pacific Company in search of minerals on unpatented lands of the railroad company and he was active during the years 1902-1903 in the examination of lands in search of evidences of oil for his employers.

Exhibit "C", plat of survey of August, 1871, of this township shows oil springs in sections 20, 28 and 29; and Exhibit "D", survey of November 18, 1893, shows evidences of oil and asphaltum in sections 19, 20, 27, 28 and 29. W. E. Youle described a heavy bed of asphalt about ten feet thick in section

24 (R. 547-8); Ira M. Anderson described asphaltum, oil sand and gas which he lighted in section 34 (R. 155-6); C. F. Whittier described asphaltum along in the fold running from the northwest to the southeast and cropping very prominently in sections 34 and 35 (R. 4700).

All of the foregoing seepages and other oil indications are within a distance of from one to four or five miles from the lands in suit.

*Township 30-23:*

This is the township in which the lands in suit lie and the evidences of oil therein have already been treated under topic 3, pages 120 et seq. of this brief.

*Township 30-24:*

This is the township immediately to the east of and adjoining the lands in suit and the testimony concerning the evidences of oil therein has been set out under topic 3, pages 120 et seq. of this brief.

*Township 31-21:*

This township is located to the southwest of the lands in controversy, about seven miles along the line of contact of the oil bearing sand with the Temblor Range. C. F. Whittier described a large cropping in section 14 and an oil seepage in section 24 thereof (R. 470).

*Township 31-22:*

This township corners on the southwest the township in which are located the lands in suit. Ira M.



Anderson described an oil seepage in section 2 thereof similar to the asphalt and oil sand showing in section 34 of the same township to the north (R. 155-6).

H. A. Blodgett, a man of large affairs at that time in and about McKittrick who, together with his partner, Mr. Jewett, owned many oil wells around McKittrick and Sunset, and his employee, Youle, spoke of a large seepage at the head of the Elk valley two and one-half or three miles southeast of a large seepage near McKittrick (R. 361). It was Jewett & Blodgett who, through their company, the Standard Asphalt Company, went into partnership with the Southern Pacific Company and donated to the Southern Pacific Railroad Company the right-of-way for the railroad from McKittrick to Bakersfield to tap the oil resources of this region. C. F. Whittier testified concerning an oil seepage in section 19 (R. 470).

#### *Township 31-24:*

This township corners with the lands in suit on the southeast. F. D. Lowe found on section 1, six miles east of the lands in suit, an oil sand 300 yards due north from the northeast corner of section 11 (R. 146), mentioning also another oil sand a half mile west of this point on the section line, which would be in the central portion of section 2. He also testified concerning a well which was drilled to a depth of 560 feet in 1901 which contained a small showing of oil and a gas supply which was piped to

the kitchen and used for cooking (R. 146-7), reference to which in some detail has already been made in this brief on pages 125-6.

*Township 32-22:*

This township is six miles to the south and somewhat west of the township in which the lands in suit lie. C. F. Whittier testified to seepages in sections 1 and 2 (R. 470), the latter seepage being also mentioned by B. K. Lee (R. 225). In the record this township is erroneously stated as 31-23, the error being corrected in the original record at page 319, but by oversight the correction was not inserted in the present transcript.

*Township 32-23:*

This township is immediately to the south of the lands in suit and about six miles distant. C. F. Whittier testified to a seepage in section 6 and adds that there were several between that section and Maricopa (R. 470). B. K. Lee testified to outcrops of oil sands in sections 21, 22 and 26 (R. 225), the latter seepage being also mentioned by S. G. Drouillard (R. 115-6-7-8) who says on page 116: "I know of seeps in 32-23 near the corner of 23, 24, 25 and 26 in the Midway. That is where I located. We found great blocks of asphaltum there. We lifted some of them up and there was oil on the under side of them seeping out."

John Jean refers to asphaltum in the Midway region without specifying the locality (R. 131).

*Township 32-24:*

This is the township in which the Buena Vista Hills partly lie. A gas blow-out in section 11 is referred to by Parker Barrett (R. 525) and by H. P. Dover (R. 462). B. K. Lee refers to this as the seepage visited by Josiah Owen, the railroad geologist (R. 230). C. F. Whittier described a blow-out caused by oil coming up through a crevice in the formation to which he set fire and which burned some two weeks or more (R. 470-1). This is given in the transcript as 31-24, but should be 32-24, as is shown by the fact that he described it as "what is called the Buena Vista Hills".

F. M. Anderson, appellants' geologist during the period under review and their leading expert witness at the trial, testified that in September, 1903, he and Professor Owen, another of appellants' geologists, were on the southwest corner of section 11 of this township and noticed the peculiar deposits in the western border of that section which they took to be deposits of asphaltum (R. 2401-2) and which he described as differing from the gas blow-out or seepage in section 32 of 30-24 chiefly in quantity and magnitude of outcrop (R. 2478). Both in 1903, when he first saw these deposits, and at the time of his visit there in 1908 he believed them to be asphaltum deposits and so stated and reported. (R. 2401-2; also bottom of p. 2478 and p. 2479.)

*Seepages in the region of Sunset:*

F. J. Sarnow testified that there are seepages ex-

tending probably two or three miles from Sunset toward McKittrick (R. 169). John Jean also testified concerning seepages in the Sunset region (R. 131). H. A. Blodgett described seepages and asphaltum about McKittrick in 1888 and 1889 (R. 361). W. E. Youle testified that there were seepages along the line of contact around Sunset in a great many places and that the evidence there was very plain from three to five miles and impressed him very much (R. 545). H. A. Blodgett also testified to a seepage just south of the standard line in section 2 of township 11 N., range 24 W., S. B. B. & M. (R. 362).

Exhibit A, the plat of survey of November 19, 1858, of township 11 N., R. 23 W., S. B. B. & M., and Exhibit "B", survey of township 11 N., R. 24 W., S. B. B. & M., approved April 29, 1874, show several pitch springs.

Concerning this region in general Ira M. Anderson testified as follows:

"The Sunset, McKittrick and what has since become the Midway fields are all about the same. There is not much difference in them. I examined them and investigated them. I discovered indications on the surface of the ground that showed that it was an oil country at that time. I discovered some of those evidences between Sunset and McKittrick. I found oil sands all through there and oil seeping out of the ground and gypsum all through that country. Where you find gypsum you will find oil. I found that in Sunset. At that time they were producing oil in Sunset and McKittrick. Between Mc-



Kittrick and Sunset the formation was about the same. There were these blow-outs through there, asphalt and oils and places where you could see what was asphalt around there and gas coming through the center of them. That condition extended generally from McKittrick to Sunset" (R. 154-5).

H. A. Blodgett testified that prior to July 1, 1904, there was practically a continuous proven field from southeast of Sunset to four or five miles northwest of McKittrick barring a slip from Fellows to McKittrick and that slip is now proven territory (R. 362).

*The region northwest of McKittrick:*

Silas Drouillard, who visited these fields as early as 1874 and for forty-five years lived in and about Bakersfield and was a prospector and miner, testified that he followed the seepages extending northwest from McKittrick to Canary Springs, which is in township 29-20, fourteen miles northwest of McKittrick (R. 116). B. K. Lee testified to dry oil sands in sections 18, 35 and 36 (R. 255) and F. J. Sarnow also knew of the same sands in sections 36, near McKittrick (R. 174).

**5. OIL DEVELOPMENT IN THE VICINITY OF THE  
LANDS IN SUIT.**

The patent in this case was issued December 12, 1904. The last of Eberlein's non-mineral affidavits was dated August 31, 1904. Before the latter date 281 producing oil wells had been drilled in the region from Sunset to McKittrick. It is undoubtedly true

that appellants knew the exact number of these wells and the location and production of each, for it has already been shown that their geologists, Treadwell, Dumble, Owen and Anderson, were constantly in and around McKittrick in 1902 and 1903—for that matter, Treadwell was there before that time. They were making examinations, explorations and investigations, preparing maps and reporting to their superiors. They could not have failed to know so patent a thing as the existence of these wells. But this is beside the question; for, whether they knew or not, since the duty of knowing all that it was necessary to know to the end that they might be qualified to make the proof required by law, namely, a non-mineral affidavit, rested upon appellants, imposed by law, they are fixed with notice and knowledge. Duty to know, certainly when coupled with opportunity of knowledge, is the exact equivalent, so far as liability is concerned, of actual knowledge. This again is so plain that no citation of authority is deemed necessary.

The existence of the wells in question in 1904 is not understood by the government to be denied by appellants. It is proven by exhibits Ha, Hb and Hc, maps respectively of the McKittrick, Midway and Sunset oil fields made, published and distributed by Barlow & Hill prior to August 31, 1904. There is no suggestion that these maps do not faithfully and accurately portray conditions in the fields to which they relate. W. H. Hill, a member of the firm of Barlow & Hill, testified to the care with which the

maps were prepared and the accuracy with which they set forth conditions as they existed (R. 109, 110 and 111). The legends on the maps make it easy to read and understand them.

The distance from McKittrick to Sunset is less than thirty miles; so that in 1904, prior to patent, there was an average of nine producing wells to the mile in the region lying between the two places.

Twenty-five hundred of these maps were published and sold, probably two thousand of them in Kern County, the remainder in Los Angeles, the East and in Europe (R. 110). Among others, the Southern Pacific Company purchased copies, beginning its purchase at the time when the maps were first published (R. 2033-4).

Exhibit Ha is the Barlow & Hill map of the "McKittrick Oil Fields". It shows a producing well in section 27 of 30-22, less than three miles west of the lands in suit. It shows six producing wells in section 34 of the same township, about the same distance from the lands in suit. It shows twenty-two producing wells in section 20 of the same township, four miles from the lands in suit. It shows seventeen producing wells in section 29 of the same township, four miles from the lands in suit. It shows two producing wells in section 28 of the same township, three and a half miles from the lands in suit. And many other wells are shown in other sections of this township and of 30-21.

This map also shows two wells on section 6 of 30-22 on the very anticline located by Josiah Owen, geologist of appellants, in 1903 on the map introduced as Exhibit 157. The exhibit in question, Owen's own handiwork, shows this anticline running from this section 6 of 30-22 through the lands here in suit. It was undoubtedly of this anticline that he wrote in his letter of March 25, 1903, to his superior, E. T. Dumble, chief consulting geologist of appellants: "Producing wells ought to be found along this exposure" (R. 1615, 1617).

The significance of the relation of the wells shown on the Barlow & Hill maps to the lands in suit, obvious as it is, will appear more fully in the discussion of the ensuing topic.

Exhibit Hd is the Barlow & Hill map of 1904 of the "Kern River Field". This oil field is about twenty-eight miles northeast of the lands in suit and was discovered in 1899. The map shows that in it in 1904 there were several hundred producing oil wells. In Josiah Owen's letter of March 25, 1904, to Professor Dumble he wrote:

"I have located the outcrop of the horizon all the way to the Sunset oil field and find there is but one oil sand and I believe *it will be possible to trace the same horizon to the Kern River fields. There are several reasons for believing they belong to the same zone.*" (R. 1620.)

The foregoing quotation from Owen's report to the chief consulting geologist of appellants is made



for the purpose of showing the connection between the lands in suit and the McKittrick field, on the one side, and the Kern River field, on the other, and to point out the strict parallel between the evidence in this case and that in the Diamond Coal and Coke Company case. The outcrop and wells from McKittrick to Sunset, the dip of the strata from this outcrop towards the lands in suit and the existence of a developed oil field beyond the lands in suit, the two fields being underlaid by "but one oil sand"—these conditions present a situation stronger and far more convincing than that developed in the cited case.

#### 6. GEOLOGICAL CONNECTION BETWEEN THE FOREGOING LANDS AND THOSE IN SUIT.

It has already been shown that the line of outcrop to the east of the lands in suit in the Diamond Coal & Coke Company case, constituting a most essential part of the "known conditions", is paralleled in the instant case by the long line of seepages and wells to the east of the lands here in suit and extending from Coalinga to Sunset. It is proposed to now show the continuation of the parallel by demonstrating by the record that, as in the cited case another of the "known conditions" was the dip of the strata exposed in the outcrop towards and under the lands there in suit, so in the instant case the dip of the oil sands or strata exposed in the line of seepages from Coalinga to Sunset and developed in the two hundred and eighty-one wells mentioned is towards and under the lands here in suit. In other

words, it is established beyond cavil that there is oil in commercial quantities to the west of the lands in suit in the stratum or strata of oil sands there exposed by nature and shown to exist in wells drilled by the hand of man. Indeed, the existence to the west of and near to the lands in suit of oil fields ranking in production and economic importance with the greatest in the world is conceded. As the witness Youle is shown to have said, "that oil must have a direction somewhere"; and it is now proposed to show that its "direction" is towards and under the lands in suit—that is, that the sand strata which constitute the known reservoir of immense quantities of oil to the west of the lands in suit "dip" towards and under them.

F. Oskar Martin (qualifications and experience pages 609-10) testified that, having seen and examined the oil indications near McKittrick, he found that the formation underlying those exudations or seepages extended easterly toward the Elk Hills and that, no break in the extension towards the east of the formation at McKittrick being visible, it was evident that the formations overlying the oil sand at McKittrick and in the Elk Hills are the same. He also testified that the formation of the Buena Vista Hills, whose oil character is admitted even by F. M. Anderson, appellants' expert geologist, is the same as that of the Elk Hills (R. 614). McKittrick is in section 21 of 30-22, only four miles from the lands in suit.

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W. E. Youle (qualifications and experience, pages 540-1), speaking generally with reference to the Elk Hills and surroundings, said: "That country is a blanket" (R. 552), meaning that the formation is of blanket character, that is, covering the entire vicinity (R. 552). The strata exposed along the outcrop at Sunset dipped into the valley towards the river (R. 544-5). The conditions around McKittrick are about the same as at Sunset (R. 544-5). That country was not a shoestring at all, but a great big field. The formation did not dip into the hills—meaning, as shown by the context, the hills west of McKittrick—but into the valley—meaning the valley between McKittrick and the Elk and Buena Vista Hills (R. 550-1). He was familiar with the country immediately surrounding McKittrick for eleven years and was over it continually (R. 562). The strata were dipping away from McKittrick and were uplifting in the Elk Hills (R. 568).

Yet again he said:

"In my opinion the upheaval in the Elk Hills was probably caused by the shrinkage of the earth. As the formation is getting older and cooling off, it goes down here and turns up at any place and folds along. I believe that is accepted by a great many men that are well posted in formations to be a very good theory and perhaps correct. As to what I mean by referring to the Elk Hills as being a fold, I will say that on the McKittrick side of the formation it is dipping at an angle of about 30 degrees, but the valley is nearly level. Now that was new to nearly everyone to find a formation dipping out into the valley. But I concluded that that for-

mation must, to a certain extent, conform to the shape of the valley, or else the valley could not have been there. It would have been uplifted hills like all that country is if it was not that way; but the depth is hard to determine, because there was no way of determining it without drilling a hole. But at the Elk Hills you could see it lifting up, with no evidence of faulty conditions like a running away of millions of tons of asphalt. That was why I thought it would be a good place to drill a well, because of that uplift. That is the difference between anticline and an uplift. That is folded without breaking it. The anticline is broken into and goes this way and that. The distinction I desire to make between a fold and an anticline is that the anticline is a broken fold according to my way of determining it." (R. 572.)

One of the evidences of the oil value of the Elk Hills which appealed to Youle was that the strata exposed at McKittrick were dipping towards the Elk Hills—the asphalt at McKittrick had faulted and broken; but on the Elk Hills side it was not broken so much, but folded up; and he made up his mind that there was a fountain-head of oil for all this alike (R. 579).

A. C. Veatch, the eminent government expert already several times referred to, after speaking of the series of porous beds along the east flank of the Temblor Range ideally designed, on the one hand, to afford a reservoir for oil and, on the other hand, to prevent undue leakage and containing oil in commercial quantities, as shown by a line of seepages of thirty miles extent and a great series of wells which

had been sunk prior to 1904 down the dip from these seepages, testified that this eastern flank of the Temblor Range dips in a general way towards the San Joaquin valley, the gentle slope being interrupted by folds which are, roughly speaking, parallel to the main fold of the axis of the Temblor Range and rise as a group of hills above the surrounding country, the general structure being evident to the most casual observer. These folds are the Elk Hills and Buena Vista Hills which he described as elongated domes of ideal structure for oil accumulation (R. 701-2-3).

Mr. Veatch further testified that the geologic structure of the Elk Hills is so very evident that a geologist standing at McKittrick would naturally and at once suspect the character of the fold. If, in addition, he was aware in 1904 of the seepages along the east flank of the Temblor Range and the wells drilled down the dip from those seepages and knew the geological structure of the region thereabout, he could not but have known the anticlinal nature of the Elk Hills and from the development at McKittrick must certainly have regarded them as an oil proposition (R. 717-8). He stated that this must have been true even in the entire absence of any knowledge or information that evidences of oil had been found in the hills themselves.

In this connection Mr. Veatch testified that, fixing the length of the lines of seepages along the east flank of the Temblor Range as thirty miles through-

out the region adjacent to the lands in suit, it shows impregnation of oil strata extending at least fifteen miles from a given centre. Applying this distance of fifteen miles from the outcrop, it includes the Elk Hills and the Buena Vista Hills, both of which fall within the proven area from geologic determination (R. 702). If any corroboration were needed, it is found in the seepages in the Elk and Buena Vista Hills; and any question which might arise with regard to the persistence of the oil as shown by these seepages is conclusively set aside by the great series of wells which had been sunk prior to 1904 down the dip from these seepages showing that the seepages represented oil in commercial quantities (R 703). (While reference to the above pages of the record will show that this witness spoke of the length of the line of seepages as fifteen miles, he corrected this to thirty on pages 718-9, explaining satisfactorily how the error was made.)

On cross-examination he again gave the reasons for considering the Elk Hills oil land in these words:

“A. Along the east flank of the Temblor Range there is a series of porous beds exposed which can be traced for many miles readily. Along this outcrop or near it where there has been a slight faulting there are seepages of oil. These seepages extend from below Sunset to north of McKittrick, showing a persistence of the oil impregnation in those porous beds. These porous beds dip to the eastward or northeastward, toward the San Joaquin valley, and are interrupted by a number of folds. That is, the gentle slope is interrupted by a number of folds, these folds being of ideal character for oil



accumulation. One of these folds is the Elk Hills. It is, broadly speaking, an elongated dome and from the persistence of the oil along the outcrop as shown by those seepages and that showing also corroborated by the great number of wells that have been sunk down the dip from this outcrop prior to 1904, indicates to me that the Elk Hills is very good oil land." (R. 803-4.)

He himself observed the dip of the formation towards and through the valley in the direction of the lands in suit (R. 805).

Attention has already been directed to a letter written by E. T. Dumble, chief geologist of appellants in 1904 and at the time of the trial, in which he transmitted to Mr. Kruttschnitt a map and advised him that the newly formed Kern Trading & Oil Company should acquire by purchase or lease from the Southern Pacific Company such lands "*as we consider valuable for oil purposes*". In this letter he wrote:

"The attached maps show these under three heads: first, oil lands proven or practically proven, colored red; very probable oil lands, colored green; probable oil lands, colored blue. Of the oil value of the first two classes there is very little doubt; the third depends in part upon the continuance of normal dips and conditions, but in addition it represents untested anticlinals which show good indications of oil. I consider that all of these lands should be under the control of this company." (R. 2913.)

The immediately pertinent language is the words "*the third depends upon the continuance of normal dips and conditions*".

One of the maps, Exhibit 119, shows that these dips are from the direction of the east flank of the Temblor Range towards the valley and the lands in suit. As already pointed out on page 80 of this brief, his course of reasoning was identical with that of Mr. Veatch, viz., that, since at one point or several points oil was found either in seepage or well, it would be found at a distance along the continuation of the stratum found to contain oil at the point of starting, provided the dip and conditions continued normal. This it is shown both that he recognized the dip of the strata towards the lands in suit (for he speaks of *untested anticlinals* in the line of the dip, necessarily referring to the Elk and the Buena Vista Hills) and did not scorn the so-called "horizon theory" of Mr. Veatch. Professor Dumble assumed the continuation of normal dips and conditions—Veatch did no more. Dumble's assumption carried him beyond the lands in suit, as shown by the lands included in his third class, probable oil lands, colored blue on Exhibit 119.

F. Oskar Martin, as has been shown, found no break in the formation and thereupon considered the Elk Hills oil land because of their relation to proven lands. Thus it appears that experts for both parties agreed upon the reliability of the assumption that, if you start at the outcrop and follow the stratum along the direction of the dip to points favorable to the accumulation and retention of oil, namely, anticlines, you will, by sinking wells, find oil. What could chief geologist Dumble have meant when he

indicated to the personal representative of the president of the Southern Pacific Company that the oil character of certain lands depended upon the continuation of normal dips and conditions other than that, if the dip and conditions continued normal, the lands in his third class would be found to be oil lands? He assumed that they were necessarily oil lands because along the line of the dip of the strata which outcropped in seepages and had been developed in wells to the west of the lands in this third class.

It will be recalled that the letter under consideration related to lands to be transferred to the fuel department of the Southern Pacific Company, the Kern Trading & Oil Company. The other map which accompanied the letter was not identified or produced. Appellants endeavored to assimilate it to their Exhibit 120; but the legend and the coloring of that exhibit manifestly exclude it. The government contended that Exhibit 157 is the map in question. However that may be, there is manifestly and necessarily close connection between the map referred to in the letter in question and the list of lands actually transferred to the Kern Trading & Oil Company by the lease of August 2, 1904, Exhibit YY (R. 1101-10).

The court may confidently look to this letter to find the lands in Professor Dumble's third class. The lands in the McKittrick district on pages 1106-7-8 of the record include section 31 of 30-23 which corners with section 29 of that township, one of the

sections in suit; sections 5, 9, 13, 23 and 25, which are farther away from the outcrop than some of the lands in suit; and sections 31 and 33 of 31-24 and sections 3, 11 and 13 of 32-24 are also farther removed from the outcrop than the lands in suit. From all of which it follows that appellants' geologists, Dumble and Owen, pursued the plan of starting from the outcrop and following the dip of the sands throughout a distance even greater than that laid down by Veatch as the basis for determining by geological deduction the oil character of lands.

In this connection special attention is invited to the testimony of E. T. Dumble on pages 3001, 3002, 3003, 3004 and 3005, as follows:

“Under certain conditions I regarded at that time anticlinals as good physical evidence in an oil field of the presence of oil, petroleum. The conditions would depend entirely upon the facts as I found them or understood them from my assistants. When an anticlinal, which in addition to being an anticlinal, shows indications of oil I thought it was a good one. It might and it might not be a fact that when I found an anticlinal in lands which were in the immediate vicinity of oil lands, proven oil lands, it would be an indication to me of possible oil land; it would at least induce me to look into it if I had any interest in it. So far as I know that anticline running across township 30 south, 23 east, passing through sections 19, 29, 25 and 27, was an untested anticline, but it does not fall within the description which I gave Mr. Kruttschnitt of probable oil lands where I state ‘It represents untested anticlinals which



show good indications of oil'. Defendants' exhibit 115 is a map that Mr. Owen obtained from the Land Department of the Southern Pacific Company in September, 1902. There appears upon this map the legend 'All shaded tracts reserved from sale because in or near oil territory.' The shaded tracts in township 30-23 are sections 3, 5, 6, 9, 11, 13, the northwest quarter of 17, northwest quarter of 19 and all of section 31; and the shaded tracts in township 30 south, 24 east, as shown by this exhibit, are sections 1, 7, 17, 19, 21, 23, 25, 27 and 35. There is nothing on that map to show one way or the other, on the date of the delivery to Mr. Owen of this map, or just prior to that time when this map had been constructed, that the lands in this suit appear not to have been patented nor does it show the patenting of sections 29, 33 and 31 in township 30-24.

"Q. Now, will you show, beginning at the Buena Vista Lake, the nearest lands to the Elk Hills, and particularly the lands in this suit, which were shaded, beginning at Township 31 South, Range 24 East, beginning at this end of the lake, that is, along here? (Indicates.)

"A. 15, 17, southwest quarter of 7.

"Q. Now, in 31-23?

"A. South half of 13, all of 15 and the east half of 17, all of 9, 5.

"Q. Now, the lands which you have described completely enclosed on the north, the northwest and the south and the west, the lands in this suit, did they not?

"A. They do.

"Q. Those were the lands which had been reserved from sale because they were in or near oil territory in 1902, is that correct

"A. According to the legend of this map, but they were a part of a blanket reservation, general reservation.

"Q. Yes, they had been reserved from sale, had they not?

"A. They had been reserved from sale.

"Q. And you so understood from Mr. Treadwell?

"A. I had no knowledge from Mr. Treadwell of what lands were reserved. This is my own information as to what lands were reserved.

"Q. Now, with reference to the line of oil outcrop along the eastern flank of the Temblor Range, running from McKittrick in a southeasterly direction towards Sunset, how much further away is the nearest land which was then reserved by the railroad company from sale because in or near oil territory, in Township 30 South, Range 24 East, than the furthestmost lands from that line of outcrop of the lands in this suit?

"A. Well, I never estimated it.

"Q. Well, it would be at least six miles, wouldn't it? It would be across a township?

"A. It would be across a township.

"Q. And that would be six miles, wouldn't it?

"A. In that location, No. 1, it would be six miles.

"Q. And also in this location here it would be six miles?

"A. It would be six miles from that line.

"Q. Then, when you took charge of the geological affairs of the Southern Pacific Company in California in reference to the oil lands

of the Southern Pacific Railroad Company, you found that it had been the policy, which you say you did not disturb after you took charge, to hold in reservation from sale, because in or near oil territory, all of the lands which were owned by the Southern Pacific Railroad Company in township 30-23 and in township 30-24?

“A. That was their policy.

“Q. And you found that to be a fact, did you not, Mr. Dumble?

“A. Yes, sir.

“Q. Now, if the lands in suit had been patented at that time, and basing your answer solely upon what you know of that reservation order, what you were told by Mr. Treadwell, and upon that exhibit which you yourself brought into court, those lands would most certainly have been reserved with the others, would they not?

“A. If a blanket reservation had been put on covering all lands in the valley as that was it would certainly have covered any lands they might have had in 30-23 or 30-24.

“Q. Yes, and would certainly have covered the lands in this suit?

“A. Unquestionably.

“Q. So that if the patent had been issued to the lands involved in this suit and you had found that policy in effect, reserving those lands because they were in or near oil territory, you would not have disturbed it, would you?

“A. I would not.”

The foregoing extract shows that prior to patent appellants had withdrawn from agricultural sale lands which enclosed on the north, northwest, south

and west the very lands here in suit—again demonstrating that appellants prior to 1905 classified as oil lands territory immediately surrounding the lands in suit and that they would have so classified the very lands in suit had they been then patented.

Appellants' geologist, Ochsner, while expressing the view that the Elk Hills were "too far out to fill," but that in them would be found scattering amounts of oil (R. 221-2), admitted that to a geologist the details of the evidence would go a long way towards an opinion in favor of the Elk Hills being oil territory and that on less evidence than existed with reference to the Elk Hills in 1904 he had advised the investment of money in the Kettleman Hills where he had found an ideal anticlinal structure, but no seepages within seven miles, the relation of the seepages to the anticlinal structure being the only evidence of the oil character of the Kettleman Hills (R. 226). He first formed an opinion of the Elk Hills as a possible or probable oil bearing territory as the result of work done in 1907 (R. 2203). He had been in the Buena Vista Hills and pronounced them similar in structure and formation to the Elk Hills and an uplift of the same geological period (R. 2210). Assuming a cropping of oil sand in the Elk Hills in connection with the correlation of the oil sand outcroppings along the McKittrick front and down as far as Sunset where the valley makes contact with the Temblor Range, he would say that the facts would be a strong element in favor of warranting a com-



petent geologist to advise the investment of money there with the hope of developing a producing oil property and he believed that many competent geologists had advised the investment of capital on less evidences (R. 2211-2).

Counsel for appellants, by the very form of his examination of the witness Anderson on pages 2422-3, admits the dip of the formation towards the valley and the lands in suit.

F. M. Anderson was appellants' principal expert, his evidence covering three hundred typewritten pages. Upon him they greatly depended. He went into the region about McKittrick in 1903, entering the employ of the Southern Pacific Company as geologist under Professor Dumble; but he did not set foot in the Elk Hills until April, 1911 (R. 2459), at which time he went there to prepare as a witness in this case. He was there next in November, 1912 (R. 2461). As will be shown, he expressed conclusions at variance not only with those of Dr. Branner, Veatch and Martin, government experts, but with appellants' own expert, Ochsner, and with their deceased geologist, Owen. While Ochsner testified that the Elk Hills and Buena Vista Hills were very similar in structure and formation and were uplifts of the same geological period (R. 2210), Anderson stated that they were altogether different and dissimilar (R. 2451-2). Since Owen was not a witness, it serves no useful purpose to here show their differences—they will be noted later upon another phase of the case.

Mr. Anderson noted an anticline and subsidiary anticlines in the Elk Hills and represented them on a map which was used in connection with his testimony (R. 2441-2); but concluded that the Elk Hills were too far away from the outcrop to be valuable (R. 2388), the distance being six miles (R. 2441). He did not believe that the Etchegoin sands, which he pronounced the oil-bearing sands of the region, could ever be carried to the Elk Hills and, if they were, only in very thin strata (R. 2455). The Elk Hills, he said, might at some time have contained an avenue along which oil migrated, but that, if any oil is there now, it would be the tail end of the procession and not in commercial quantities (R. 2456). He admitted that in 1903 and 1904 his conclusion as to the likelihood of the Elk Hills being then or ever oil territory was negative; that, at least, it was not commercially oil territory (R. 2454). But in 1903-1904 he recommended the inclusion in the lease to the Kern Trading & Oil Company of section 31 of 30-23, which is in the Elk Hills and corners with the very lands in suit (R. 2415 and 2702). Thus, he excluded the lands in suit on the ground that they were too far away from the outcrop, but included in a lease for oil purposes to the fuel department of his employer a section which is equally far removed from the outcrop.

Mr. Anderson brought himself into sharp conflict with Dr. Branner and A. C. Veatch. He dissented from the latter's "horizon theory," which he

was actually applying in classifying section 31 of 30-23 as oil land; nor could he lend countenance to the position of Dr. Branner that a geologist who saw the Elk Hills in 1903 and observed the surrounding conditions and who did not conclude that the Elk Hills were oil lands did not know his business (R. 2546-7). No charge against him of timidity or modesty could be sustained.

In 1903 Anderson thought the Buena Vista Hills, which his colleague, Ochsner, pronounced very similar in structure and formation to the Elk Hills and an uplift of the same geological period, highly prospective oil land (R. 2402-3). One of the things which contributed to this conclusion was the large deposits in sections 11 and 15 in the Buena Vista Hills which both he and Owen in 1903 and in 1908 thought asphaltum and so reported (R. 2478-9). These deposits differ from that in 32 of 30-24 chiefly, he said, in quantity and magnitude of outcrop (R. 2478). He did not see the latter, however, until November, 1912 (R. 2473), at which time, differing with Dr. Branner, Veatch, Martin and many other skilled scientists, he concluded that it was a gas seepage—partly hydrocarbon gas and hydrogen sulphide—not necessarily petroleum gas—largely methane (R. 2474-5). To be consistent, he then changed his view as to the character of the deposits in the Buena Vista Hills. At that time, it may be stated parenthetically, some of these lands in the Buena Vista Hills had been bought for oil purposes under the advice of Anderson and a

notable well had been brought in by the Honolulu Consolidated Oil Company which was accepted as demonstrating the immense richness of the land as oil territory. When in 1903 and later Anderson and Owen were working together, Owen, as was known to Anderson, was seeking to acquire this land in the Buena Vista Hills under agricultural scrip for himself and Professor Dumble, all three of them being at the time geologists of the Southern Pacific Company (R. 2562-3-4-5-6-7-8-9-70). When Dumble told Anderson that he was obtaining the land for orange or eucalyptus culture, the latter "smiled more or less at the likelihood of raising oranges there" (R. 2568-9). Owen located sections 2 and 10 of 32-24 in the Buena Vista Hills for gypsum. Anderson and Owen visited both sections in 1903 and agreed that they were oil lands. Anderson had never seen any commercial gypsum on them (R. 2576-7). Dumble told him that the Buena Vista Land & Development Company held interests for him and Owen in these lands (R. 2579). They were subsequently sold to Captain Matson, head of the Honolulu Company, upon Anderson's advice that they were oil lands (R. 2580). Owen let Anderson know that the lands were for sale and Anderson offered them to Crandall, attorney for Matson (R. 2581-2). Anderson knew that the Buena Vista Land & Development Company was trying to secure agricultural patents to these lands which he, Anderson, knew were mineral lands (R. 2582-3). Anderson knew that Owen and Dumble were contributing geological advice to the Buena Vista Land &



Development Company as to the oil value of these lands which it was seeking to acquire by the use of agricultural scrip (R. 2583-4-5-6).

Anderson admitted on cross-examination that, if he had known in 1903 and 1904 of the gas blow-out in 32 of 30-24, he would temporarily have believed the Elk Hills oil lands (R. 2626); and yet they were as far away from the Temblor outcrop then as now and the presence of the gas seepage certainly made them no nearer. As already shown, he testified that he had in his own mind in 1903 condemned them and utterly cast them out because of their distance from the outcrop; but at the trial he admitted that knowledge of the gas seepage would have induced a different conclusion. Can it be that this admission was made because necessary to free him from embarrassment in view of the fact that, while condemning the Elk Hills, he appraised their neighbors, the Buena Vista Hills, as oil lands though practically the same distance from the outcrop to the West? Confronted with the similarity between the two uplifts, the one of which he pronounced good and the other bad, he had the "impressive" deposit in the Buena Vista Hills to buttress his favorable opinion, while in the Elk Hills he had not then seen the deposit which he afterwards claimed differed from that in the Buena Vista Hills chiefly in magnitude. And he admitted that, after all, the nearest point of the Elk Hills was distant only four miles from his so-called Etchegoin shore-line (R. 2648).

Admitting that section 31 of 30-23 rises on the slope of the Elk Hills and that he in 1903 determined that it was prospective oil land and recommended its inclusion in the lease to the Kern Trading & Oil Company, Anderson said that if it was prospective oil land in 1903, perhaps all of the lands in this suit were prospective oil lands at that date (R. 2702-3); and that, if they had been patented at that time, he perhaps would have included them in the Kern Trading & Oil Company lease, though he was doubtful about this (R. 2703).

Taking all of the foregoing together, it is manifest that Anderson clearly recognized in 1903 the relation of the Elk Hills to the surrounding oil country. His reference to the migration of oil from the Temblor contact, where the seepages and long line of outcrop are, towards the lands in suit shows that he recognized the dip of the strata away from the Temblor Range and towards the valley and the Elk and Buena Vista Hills (R. 2455-6). There could manifestly be no "migration of oil" in that direction unless the oil strata dipped in that direction. Indeed, his testimony is filled with statements showing his recognition of the favorable structure and situation of the lands in suit, insomuch that it savors throughout of a confession and avoidance; and it is all crowned with the reluctant admission that, if in 1903 he had known of the deposits in 32 of 30-24, he would temporarily have regarded the lands in suit as oil lands (R. 2626). In other words, if Anderson in 1903 had seen these deposits,

as had Owen, his fellow geologist, he would, as Owen and others will be shown to have done, have regarded the Elk Hills as oil lands. 1903 is the time by which events are to be measured in this case. What was thought, what was believed, what was known in 1903 and 1904—these are the important things in this controversy; for the inquiry is as to conditions then and whether they were such as to engender the belief that these lands were valuable oil lands. Anderson says, in effect, that, if he had known what Owen, appellants' trusted, skilled geologist, knew, it would have engendered in him the belief that these lands were oil lands.

Anderson, with commendable frankness, admitted that the fact that the log of a well drilled in 1910-11 by the Associated Oil Company, a subsidiary of the Southern Pacific Company, in section 26 of 30-23, in the immediate midst of the lands in suit, showed 159 feet of oil sand did "not seem to harmonize with my theory—it does not fit my theory very well to see so much sand represented in the log." (R. 2651.) He had said that the Elk Hills were too far away from the shoreline which he had conveniently discovered, one of whose points was seen at McKittrick, for the current to have carried the sands to them. The log in question was brought into court by appellants and showed, as indicated, 159 feet of sand, while Anderson admitted that the average thickness of sands in the Midway, Sunset and McKittrick districts was much less than sixty feet and that there were only two wells in those districts showing greater thick-

nesses than 159 feet (R. 2635-6). And, finally, this witness, to save his face in view of subsequent developments, admitted that, notwithstanding all that he had said in condemnation of the Elk Hills, in 1903 and 1904 he thought that there might be some insignificant deposits of oil in them (R. 2454). And this, too, from the expert who projected and stood sponsor for the proposition that the drill is the only test of oil land. He said:

“There are obviously four essentials to oil territory, the failure of any one of which might be fatal. The territory must have the proper structural conditions, the proper stratigraphic conditions, the proper source from which oil may be derived in the immediate surrounding country and, last and most important of all, it must have oil in the reservoir, whatever it might be.” (R. 2548.)

Asked how you can determine whether it has oil in the reservoir, he replied:

“You can determine it only by drilling wells” (R. 2548).

Measured by his own test, how could he have determined that, if the Elk Hills contained oil, it was only in insignificant amounts? How much oil there is at any place can, he says in one breath, be determined only by the drill; and in another breath he says that he determined without the drill that such oil as was in the Elk Hills was insignificant in amount, at least not commercial. His unfavorable view of the Elk Hills is condemned by his own test—he is “hoist by his own petard”.



It must already be apparent that there is no real controversy in the evidence as to the favorable structure and stratigraphy of the lands in suit, whether one considers the testimony of the appellants or of the government. Nor is there doubt of the presence of oil in commercial quantity in the "immediate surrounding country". Anderson says that these in combination mean nothing until they have been followed by the drill—the exact counterpart of the contention of the Coal Company in the Diamond Coal and Coke Company case which was condemned by the Supreme Court.

B. K. Lee testified to an outcrop on section 35 of 30-22, which is within less than two miles of the nearest of the lands in suit (R. 224-5). Colon F. Whittier testified to a very prominent outcrop in the same section (R. 470). From this it appears that the lands in suit are considerably nearer the outcrop than Mr. Anderson was willing to admit. His proximity theory would not permit of too great nearness. Surely two miles qualifies as "immediate surrounding country".

Owen's map, Exhibit 157—not a government exhibit, but appellants'—shows the Elk Hills anticline from section 6 of 30-22 and through the lands in suit. On this section 6 in 1904 there were at least two oil wells. F. J. Sarnow drilled them eight or nine years prior to the time when, in April or May, 1912, he testified as a witness (R. 174). N. C. Farnum testified that there was a well there before 1904 (R. 498-9); and these wells are shown on the

Barlow & Hill map of the McKittrick oil fields, Exhibit Ha, already referred to. It thus appears that before patent wells had been drilled and had found oil in the very structure which Owen showed running through the lands in suit. It also is shown that within two miles of the lands in suit the oil sands outcropped and that within less than three miles there were producing oil wells. Undoubtedly, these were among the things that induced Dr. Branner to say that no competent geologist would in 1904 have failed to form the opinion that these lands were oil lands. Owen was in and repeatedly over this region and upon the lands in suit at that time and he was a competent geologist. It is not matter of wonder, then, that he formed the correct conclusion; nor is it surprising that he and Professor Dumble, whose diligence in behalf of gaining information for appellants was second only to their forehandedness in securing for themselves oil lands by agricultural entries and otherwise, located even-numbered or non-railroad lands in the Elk Hills.

It is beyond question that section 31 of 30-23 was in the third class of lands to which Dumble referred in the notable letter to Mr. Kruttschnitt, Exhibit 119, already quoted, in which he classified the lands to be transferred to the Kern Trading & Oil Company as "proven", "very probable" and "probable". This third class, he wrote, "depends in part upon the continuance of normal dips and conditions, but in addition it represents untested anticlinals which show good indications of oil", obviously having in

mind the wells then on section 6 of 30-22, the very anticlinal formation running through the Elk Hills (R. 2913). Thus, again, the geological connection between the lands in suit and the surrounding oil territory is not only shown, but is seen to have been understood and appreciated by appellants' chief geologist even before patent.

Nor can there be doubt that the lands in the Elk Hills and especially those on the anticline so clearly drawn by Professor Owen on Exhibit 157, already referred to, and running through the very lands in suit, were in his mind when he reported:

“The fold north of the McKittrick and running nearly parallel passes through sections 5-9 between 11 and 15 through 13 of town 30 R. 22. *This fold exposes the oil sands in several places and in some of the exposures the sands are strongly impregnated with asph and producing wells ought to be found along this exposure.*” (Italics supplied.) (R. 1617.)

This letter was written March 25, 1903, was addressed to Professor Dumble and is an unanswerable document showing Owen's knowledge of conditions generally and his full appreciation of the relation of the Elk Hills, the lands in suit, to the surrounding oil territory. The Elk Hills anticline, as traced by him on appellants' Exhibit 157, is the fold or anticline—geologically “fold” and “anticline” are synonymous and interchangeable words—north of the McKittrick fold or anticline “and running nearly parallel” and it continues on into the Elk Hills and through the lands in suit. Owen recog-

nized and appreciated the significance of this connection of unproven territory with proven and confidently predicted, reasoning from the certain to the probable, that "producing wells ought to be found along this exposure". As already seen, there were at that time oil wells on section 6 of 30-22 through which the same anticline or fold runs. (The Owen letter in question appears at pages 1615-1620 of the record.) Exhibits 4Sa and 4Sb, pp. 44 and 45 of the plat book which Owen kept with him in the field, show the same anticline and indicate the land here in suit as "possible oil lands".

Furthermore, Prof. Owen in this same letter says:

"In the direction of Midway I find that the McKittrick fold flattens out in the valley, but other hills further on in the same direction would indicate that it may extend to near the Kern Lake." (R. 1617-18.)

Kern Lake is in township 31-27; so that Owen's view of the persistence of oil sands goes far beyond the requirements of Veatch's so-called horizon theory and is in direct conflict with the narrow zone view which Anderson ascribed to himself.

The closing paragraph of the letter in question is eloquent of Owen's recognition of the connection of the Elk Hills and the lands in suit with the known oil territory. He writes:

"I have located the outcrop of the horizon all the way to the Sunset oil field and find there is but one oil sand, and I believe *it will be possible*



*to trace the same horizon to the Kern River fields. There are several reasons for believing they all belong to the same zone."* (Italics supplied.) (R. 1620.)

It is thus seen that he had traced from McKittrick to Sunset the exposures or outcrop of the oil bearing sands and that he believed that these sands extended all the way to the Kern River fields and that it was all the same sand. From McKittrick to Sunset is about thirty miles and from the center of the line of outcrop from McKittrick to Sunset to the Kern River fields is twenty-eight miles. Throughout this entire area Owen, the field geologist of appellants who was in and about McKittrick from early in 1903 to long after patent, December 12, 1904, believed that there was but one oil sand. In this he was in entire accord with Dr. Branner, Mr. Veatch and, indeed, all of the witnesses except one or two geologists of appellants who evolved the specious and convenient theory that there were several oil sands and that they had no connection with each other. Owen, in fact, differed with Dr. Branner and Mr. Veatch in that he went far beyond them in his view of the persistency of the oil sands. He connected the distant Kern River fields with the Coalinga-to-Sunset field and believed them the same in origin—and he was the expert, trusted servant of appellants and lieutenant of their chief geologist, Prof. Dumble, who paid him the tribute of saying that he "was a very remarkable man", meaning "that he had a faculty of carrying underground conditions in his mind more perfectly than any man I ever met". (R. 3037.)

No question arises upon this record of the outcrop to the west of the lands in suit at places no farther away than two or three miles. No question arises as to the dip of the oil-bearing formation or strata towards the lands in suit. In 1899 oil had begun to be produced in the Kern River fields, twenty-eight miles to the east of the lands in suit, from sands which Prof. Owen believed to be the same sands outcropping from Coalinga to Sunset. The testimony fully establishes the existence in the immediate midst of the lands in suit of oil-bearing sands and proves that Owen knew of this outcrop and believed in it. Is there occasion for surprise then that he believed in the oil character of the lands in suit? That he did so believe and acted upon his belief will be the subject of later treatment. Pause is made here merely to point out that, from the record, from the standpoint of Dr. Branner, Veatch and others, all of the elements combine to complete the perfect parallel between the instant case and the Diamond Coal and Coke Company case.

Prof. E. T. Dumble testified that, if in 1902 he had found an actual oil seep in a break in section 32 of 30-24 and the same was taken in connection with the anticlinal structure found by Owen, he would have regarded the lands in that vicinity in the Elk Hills as favorable to expect the occurrence of oil there (R. 3039); and this comes from appellants' chief geologist who himself had made no examination of the Elk Hills country at that time (R. 3040).

The surroundings must have been very suggestive, very impressive, and their geological relation to the lands in suit very evident and persuasive to wrest from him so damaging an admission! For what he says amounts to this: if to his knowledge, prior to patent, of the outcrop, exposures and wells to the west and in the vicinity of the lands in suit in strata dipping away from the Temblor Range and towards the valley and the lands in suit, together with the fact that oil had been developed commercially in the Kern River fields many miles to the east, there had been added knowledge of the exposure or deposit in section 32 of 30-24, he would have pronounced the lands in suit oil lands. His admission shows that, had he had Owen's knowledge, he would have entertained unreservedly Owen's belief. Of the belief of both of them more will follow later herein. His self-ascribed lack of belief, clearly, is predicated upon his lack of opportunity to examine.

The relation of the surrounding country to the lands in suit has been shown to be such that appellants' chief geologist would, if he had known of the deposit or seepage on 32 of 30-24, upon it have predicated the oil character of the lands in suit. Having that information, Owen, another of their geologists, believed the lands to be of oil character; and Anderson, the only other geologist whom they had at the period in question, placed himself alongside of Dumble and admitted that, if he had known of the deposit in 32 of 30-24, he would temporarily

have believed the Elk Hills to be oil lands (R. 2626). It is already shown that of the three Owen was the only one who had been in the Elk Hills prior to 1905. Owen was the geologist who reported on the lands to be leased to the Kern Trading & Oil Company. He was the field geologist and questions important and mighty were committed to his decision. As will hereafter be shown, both he and Dumble thought so well of the Elk Hills that they sought to acquire for themselves lands therein. It is true that Dumble testified that he thought he could say positively that Owen did not tell him of the deposit in 32 of 30-24; but the fact remains that he did not swear that he did not and he, in making locations, acted as if Owen had told him.

#### 7. NON-AGRICULTURAL CHARACTER OF THE LANDS IN SUIT.

That the lands in suit are wholly without value for agriculture and are totally worthless for any other than oil purposes convincingly appears from the evidence. That this is true will appear more material when later in this brief the solicitude and extraordinary efforts of appellants to secure patent thereto are shown.

First will be briefly recited the testimony of numerous government witnesses upon this question, followed by the testimony of a number of appellants' witnesses to the same effect.

S. G. Drouillard testified that the Elk Hills had no value for crops; that early in the Spring, for about



two or three months, the land had some value for grazing purposes; but that there is no possibility of water for irrigation purposes unless it could be gotten by artesian wells, there being no surface indication of water and the country being badly broken and cut up by small, short canyons (R. 117).

John Jean testified that the general formation of the surface is broken, reminding him of an ash-pit; that there is a little sage brush now and then in the hills and that part of it may be susceptible of agricultural development and part of it not; that he did not know whether crops could be raised, never having seen it tried (R. 129).

F. J. Sarnow testified that the lands are not valuable for agriculture, the surface of the ground being rough and barren and the only vegetation some sage-brush, unless there is an amount of rain, when a little grass grows which does not remain very long (R. 165). He also stated that there is no water there and that the land is not susceptible of economic agriculture (R. 181).

B. K. Lee testified that he never saw any water in there and very little vegetation, what little vegetation there was consisting of sparse sage-brush and some grass; that the hills are rather barren and not susceptible of agriculture and have only a slight value for grazing (R. 228).

J. I. Waggy testified that he had been over every section and that the lands are without value for

agriculture; that since he had been in the country there was not sufficient rainfall to raise a crop; that the surface is too rough, the climate being rather a dry, warm, desert climate, but that in ordinary years during sixty or ninety days there was sufficient vegetation to graze sheep (R. 248-9).

I. N. Chapman testified that the Elk Hills were dry and parched when he was there; that their elevation is about seven hundred feet and that they did not seem to be very valuable for agriculture (R. 316).

S. P. Wible testified that the lands in 30-23 have absolutely no value for agricultural purposes as they are too hilly to be cultivated and there is not enough level land to do anything with; that in the Spring of the year they have some value for pasturage, but that this is true only in a good season and that the value of the lands is for mineral (R. 324).

W. G. Sylvester testified that: "As to the agricultural possibilities of the Elk Hills for raising crops I think a man would have a picnic raising a crop there, as the hills are pretty steep and there is absolutely no water" (R. 358).

Jacob Kaerth testified that he did not consider the lands of any value for agricultural purposes, they being bare, very rough and precipitous and cut up badly by gulches and ravines and having no water (R. 418).

H. P. Dover testified: "The Elk Hills have no value for crop raising or agricultural pursuits that I have ever known of. For farming it was no good. It was rough and dry. Nothing seemed to grow there. In the Spring of the year of a wet Spring there might be a little feed for a month or so. The chief value of the Elk Hills is for oil, if for anything" (R. 462).

C. F. Whittier testified that the Elk Hills have not much value for grazing, there being nothing there to keep the stock long; that they could not live while they were going across; that there had been some sheep around through the country there; and that he did not know of any use that had been made of the land (R. 475).

Frank Barrett testified: "As to their value aside from the oil value, I do not think you could raise a black-eyed pea on them. I would not have them to pay taxes on them for agriculture. I do not think they have any value at all for agricultural purposes—for raising crops. As to their value for grazing, I suppose when the winter rains occur the filaree would grow there, but it would not last very long, probably not over six weeks or two months in a very good season" (R. 481).

M. T. Hubbard testified that if the Elk Hills had no value for oil, he did not think them worth anything (R. 491).

N. C. Farnum testified that township 30-23 has a

value as oil land and nothing else unless for gypsum or fullers-earth (R. 508).

Parker Barrett testified that the Elk Hills, including township 30-23, have no value for agriculture; that he could not say that they had absolutely no value for grazing, but that they did have a little value for that; that sheep occasionally ranged across there and found very little feed even in a good season; his reason for saying that they have no agricultural value being that very little of the land lies so that, even if there were water on it, it could be cultivated; that, if you turned water on a good deal of it, it would all wash away (R. 526).

W. H. McKittrick testified that the Elk Hills are absolutely worthless for agricultural purposes; that a sheep man would not pay taxes on it even as a grazing proposition; that he never saw a drop of water all through there; and that the surface is so eroded that nothing could be done in the way of agriculture, even if there were water (R. 539).

W. E. Youle testified that the lands have no value other than for the purpose of drilling for oil (R. 577).

Chas. W. Lamont testified that he had been over most of the Elk Hills in 30-23 and 30-24 and that he did not think the lands valuable for agriculture and had never found any water there; that he had offered to rent the ground that he had located for ten dollars a section to a sheep man, but the sheep man



would not give it unless he would agree to put water there (R. 582).

F. Oskar Martin testified that he had examined the soils of the lands involved in this suit and had found them residual gravely sand; that on that account their drainage would be excellent, but that for the same reason they are not capable of retaining sufficient soil moisture to induce plant growth; that in view of the slight rainfall it was apparent to him that no agricultural crops could be raised on them; that he saw evidences on the west half of section 16 of 30-23 that about ten acres of land had been plowed or scraped over; that he found a stack of barley, but that the crop had not been a plentiful one and had not matured (R. 615).

Jas. M. Gleaves identified copy of plat of survey of 30-23, approved by the Surveyor General of California August 1, 1902, marked plaintiff's Exhibit "E" and showing that the lands in suit were returned by the Surveyor General as mineral lands (R. 107).

The following is from the testimony of witnesses for appellants:

J. B. Treadwell, oil expert of appellants in charge of their operations in the region around McKittrick prior to patent, admitted while on the stand as a witness for appellants that the lands in suit had no agricultural value at all except for grazing in the Spring of the year (R. 3473).

L. D. Bell testified that he knew the value of agricultural lands in the region in question, having been in the business of agriculture and grazing for a number of years, and that the Elk Hills have no value for agriculture or farming (R. 1805).

H. J. Hart testified that the lands would be valuable for agricultural purposes, if water could be gotten (R. 2112).

T. M. Storke testified that he would not give eighteen cents an acre for the whole Elk Hills for any purpose (R. 2045).

John Lang testified that except for about four months the season in the Elk Hills was dry and that they were absolutely valueless except for the minerals that they contained; that personally he would not give much for them as a grazing proposition (R. 1967).

Samuel Shannon testified: "The Elk Hills are a desert country not absolutely devoid of desert vegetation, but of a desert character; a region of very light rainfall and sparse sagebrush. The Elk Hills are a barren group of hills somewhat similar in appearance to the Buena Vista Hills" (R. 2143).

W. H. Cooley testified that, while the lands would be very prolific if there were water, he did not know of any chance to get water and that he did not think that they had any value as farming lands (R. 1815).

R. K. Howk testified that the lands in the Elk Hills in their present condition have absolutely no value for agricultural purposes (R. 1849).

It is submitted that, in view of the foregoing evidence, there can be no question that the Elk Hills are without substantial value except for the minerals which they contain, insomuch that, if the question were to be determined in the first instance by this court, it must be resolved in favor of the government; a fortiori, there is nothing in the findings of the lower court even suggestive of palpable or manifest error.

L. J. King, superintendent of oil properties of the Associated Oil Company, a subsidiary of the Southern Pacific Company, called as a witness in a mineral contest before the land officers at Visalia, testified that the land in the Elk Hills cannot be cultivated because it is rolling and uneven, without artificial irrigation, and even then is not susceptible of cultivation; it has no agricultural value and a rental value of ten cents per acre per annum for grazing purposes; contains no vegetation except scattered growth of sage-brush and is without water by stream or springs. He said that section 26 adjoining the lands in suit was chiefly valuable for oil, particularizing the section which was involved in the contest. Exhibit 9-R.

T. E. Barnes, testifying under the same circumstances and with the same connections, said the Elk Hills could not be cultivated without artificial irrigation. They are rolling and uneven, the land possesses no agricultural value and but a nominal value of ten cents per acre per annum for grazing. No

vegetation exists except a scattering growth of sage-brush and the hills are cut with no streams and contain no springs. He also said section 26 was chiefly valuable for oil. Exhibits 9-F; 9-N, and 9-R.

## B. BELIEF, GENERAL AND SPECIFIC.

In the Diamond Coal and Coke Company case the court, after reviewing the testimony concerning the known physical indicia upon which the expert for the government, whose views were adopted, based his conclusion that the lands there in suit were coal lands, sets out certain conduct on the part of the coal company which indicated its belief in this coal character, stating that the conclusion reached by the expert "had substantial support" in the conduct in question. The following is the pertinent passage:

"The expert for the government proceeded upon the theory that, when the known surroundings are such that practical coal men would invest in particular lands for coal mining or advise others to do so, those lands are to be deemed coal lands, even though coal has not as yet actually been disclosed within their limits. And having in mind the outcropping coal bed, the direction and inclination of its dip, the character of the rocks with which it was interstratified, the quality and thickness of the coal at the outcrop, the proximity of the lands to the outcrop and the topographical and structural features of the vicinity, he gave it as his opinion that the coal bed extended into and through the lands in question and that practical coal men would regard the lands as valuable for coal and invest in them as such. He accordingly pronounced them coal lands within his acceptance of that term. This conclusion *had substantial*



*support*, not only in the facts already recited, but also in the fact that the company's maps, made three years before the suit was begun, showed that it was intended to project its mining operations westward from the outcrop a mile and a half and had designated the intervening lands, which included some of those in controversy, as coal lands, and in the further fact that the company had returned lands extending westward a similar distance, likewise including some now in controversy, as exempt from direct taxation by reason of a local statute substituting an output tax upon coal mines. Laws Wyo. 1903, chapter 81, p. 101. The return for the year in which the maps were made claimed an exemption of substantially six sections in two tiers of three sections each, although the work of developing the mine (No. 4), as shown by the maps, was still within the east half of the middle section in the eastern tier." (Page 942.)

The Supreme Court proceeded upon the basis that, the question being whether a given belief would be engendered by certain found conditions, proof that that belief was engendered was competent to show the probative value and effort of the found conditions. Holding that the known conditions were such as to engender the belief, it checked its own conclusion by conduct on the part of the defendants showing that, with no knowledge other than that furnished by the known conditions, they entertained that belief.

This record is writ large with evidence showing the belief of appellants in the oil character of the lands in suit, that belief appearing both in the words and acts of various responsible officers and agents of

the Southern Pacific Company and the Southern Pacific Railroad Company. There is also much testimony as to the general belief in and notoriety of the oil character of these lands, as well as of the belief of individuals. Accordingly, first will be set out the evidence of general belief in and notoriety of the oil character of the lands in suit; next, evidence of the belief of appellants; and last, evidence of the belief of individuals not connected with appellants.

**1. General belief in and notoriety of the oil character of the lands in suit.**

The evidence in support of the contention that there was prior to patent general belief in and notoriety of the oil character of the lands in suit follows. It is not suggested that this was one of the conditions which showed the lands oil lands, but that it is related to those conditions as effect is related to cause, it plainly appearing that those conditions led to the belief and caused the notoriety in question. The evidence incidentally demonstrates knowledge by the appellants of the known conditions.

S. G. Drouillard testified that the Elk Hills looked as good as any other land in that country and in 1899 was generally regarded by competent oil men as oil territory, everyone who saw it, people that were supposed to be oil men, saying that it was good oil land (R. 122). He further stated that there were numerous locations and that the lands were supposed to be in the oil belt and all of the ground that was in the oil belt was supposed to be oil land (R. 124); and

that people regarded the entire bunch of hills known as the Elk Hills as good oil territory, township 30-23 being located in the middle of the Elk Hills and being regarded as good oil territory (R. 125).

John Jean testified that the Elk Hills were regarded as oil territory in 1904 and that he regarded them as such and would not otherwise have made locations there (R. 131).

L. G. Sarnow testified that he thought the Elk Hills good for oil and that J. B. Treadwell, oil expert of the Southern Pacific Company, thought them good for oil, but that both of them thought that it was deep (R. 135). He further stated that in his opinion a competent geologist, who knew the formation of the Elk Hills, its comparison and similarity to the general McKittrick formation along the eastern flank of the Temblor Range, the development of oil sands by actual drilling along the Temblor flank from Sunset to McKittrick, the oil seep that he had mentioned in the Elk Hills and such other evidences of oil character as were plainly conspicuous upon the ground, would in 1904 have recommended the investment of money in the Elk Hills with reasonable expectation of developing paying oil property (R. 139-140). He also stated that, even if the samples taken from the blow-out in 32 of 30-24 failed to respond to tests for petroleum made by competent and disinterested persons according to the best approved methods, he would still say that it was a cinch that the lands were oil lands (R. 142).

F. D. Lowe testified that prior to patent he talked with people whose opinion was worth something and that they believed that there was oil in the Elk Hills, C. A. Barlow, a witness for appellants, among others, saying "I don't doubt it". He further stated that people believed that oil was there in paying quantities and that that belief was generally entertained by men interested in the commercial production of oil and in the business at that time (R. 149-150). He further stated that, while no prospectus was ever gotten out by his company, the Lakeview Oil Company got out one in the Summer of 1901, when his company was down about 500 feet in the Elk Hills, and in it stated that there was every indication of his striking oil (R. 150). Nothing occurred from the time he made his location in section 11 of 31-24 until the fall of 1904 to change his opinion of the territory as oil property. He still held to the opinion that there was oil there and still believed that it was a good oil country (R. 151). The opinion of oil men of this land was good and their opinion was that there was oil underneath the surface. C. A. Barlow told him that he didn't doubt that it was good oil land. The McCutchens, who are drillers and operators in the Sunset field and with whom he talked, in 1901, 1902 and 1903, were of the opinion that the land was good and believed that there was oil there (R. 152).

Ira M. Anderson, stating that the Sunset, McKittrick and Midway fields are all about the same and that the existence of oil evidences there were known



in general to the people around there at that time, testified that the chloroform test which he made of the earth, rock and shale in the Elk Hills showed oil and oil sand and that the formation was there to show that the Elk Hills were in his opinion oil producing territory. He found blow-outs in the Elk Hills (R. 156).

F. J. Sarnow testified that he had been in the Elk Hills and considered them oil territory, although expensive; that he talked with Treadwell about different lands and that Treadwell thought there was oil in the Elk Hills, although it would be expensive (R. 165), explaining that it was expensive because there was no water in that country (R. 171).

M. S. Wagy testified that prior to patent he located lands in 30-23 and 30-24, eight or ten sections (R. 177); about as early as 1899 he regarded the Elk Hills as oil territory because there were the same indications there as where he was getting oil and better indications than in the Kern River field where oil was being produced; that he talked with Silas Drouillard about the Elk Hills and that he, Drouillard, in 1900-1901, thought they were good (R. 180). He further stated that he knew Josiah Owen and talked with him in 1900. Owen thought that that was an oil district (R. 182-3).

B. K. Lee investigated lands in the Elk Hills in 1903 and upon his recommendation 159 acres in section 36 of 30-23 were bought for mineral possibilities for oil. He found more clays and sands ex-

posed in 30-23 than in the country immediately adjoining the McKittrick oil field and recommended the purchase of the lands for their oil value (R. 229). Josiah Owen told him that the Buena Vista Hills was a great gas country; that he had found evidences of gas there in eleven different places where he could stick a bar into the ground and get a flash of light; he also found an oil sand in section 11 of 32-24 (R. 230).

J. I. Wagy with Jewett, Blodgett and Youle, pioneer oil men and operators, located all over 30-23, also in 30-24, 31-23 and 31-24, some 50 odd sections, for oil (R. 239). He discovered the seepage in 32 of 30-24 in 1900. He reported it to Mr. Blodgett of the firm of Jewett & Blodgett who sent over their oil expert Youle to examine it. Youle examined it and said that it looked pretty good to him and that it was worth spending money on (R. 240). As a result of this a meeting was held, a company formed and the lands located. Surveyors were procured, surveys made, ground mounded and location notices posted (R. 243). Witness said he surely regarded the Elk Hills as oil territory at that time or he would not have spent his time there. They went on and made locations on Youle's advice as much as anything else (R. 245). They built a house and a stable and cut a road on their locations and had a crew of men digging shafts for several weeks (R. 246). He remembered the stampede in the Elk Hills about 1901 (R. 247). They thought all their locations were oil lands (R. 250) and spent \$5,-

000.00 on the south half of township 30-23 (R. 251) which is that portion of the township occupied by the lands in suit. In making re-locations which they continued doing for six or eight years (R. 253) they went out at midnight and lay in the sagebrush to "beat the other fellow to it" (R. 254). The western portion of the Elk Hills which would include the lands in suit he considered to be oil-bearing lands at the time of locating there and at the time of testifying in this case since, as he expressed it, he didn't know anything to change his former opinion (R. 266-7). He "most assuredly considered the Elk Hills oil territory or he would not have spent his time and money there". (R. 269.) In 1912 a Mr. Myers called on witness looking for information for the Southern Pacific Company in regard to the Elk Hills and asked him if he was the Wagys on the early locations in there and on being told that the witness was, asked this question: Did you consider that oil territory? And the witness replied: "Most assuredly I did, or I would not have spent my time and money there." To this Myers rejoined: "I don't think you will do me much good" and bade him good-day (R. 269-70).

W. E. Ott testified that he first went to McKittrick in 1901 and that he always thought there was oil in the Elk Hills and that it was the general belief among oil men about McKittrick that the Elk Hills were oil territory; that he heard it talked about all the time he was there as early as 1901-1902, and Josiah Owen, in speaking to him of the territory in

general from McKittrick to Sunset, which is known now as the Midway district, said that it would be a great field (R. 277); that there was a general belief amongst oil men that the Elk Hills was oil territory, all the time he was out in that country and up to the present time (R. 286). In fact there were rigs over in portions of that field at that time which had more or less oil on them. Wible told him the Elk Hills was oil territory in 1901 (R. 286-7). Treadwell also thought the Elk Hills was good oil territory, as also lots of oil men around there (R. 288). Youle and Blodgett also told him it was oil territory prior to January 1, 1905 (R. 290).

I. N. Chapman about 1893 surveyed the eastern boundary of township 30-23 and regarded it as very probable oil land. "It is all the right formation in which to find oil". That was true of the hills there known as the Elk Hills and clear over to the Carissa plains (R. 315). When he spoke to the United States Surveyor General about the probability of oil in 30-23, the latter advised him not to mention it because it was a difficult matter to prove. He talked the matter over with his men there at that time and told them that he believed there would be oil discovered in that country and that there would be a great boom in oil (R. 316). He said a man would be justified in investing money with a reasonable expectation of getting oil upon the indications that he saw (R. 317).

S. P. Wible discussed with Josiah Owen the oil possibilities of lands in the vicinity of McKittrick.



Owen was very familiar with the formation of that country and particularly with reference to the Elk Hills including 30-23. Owen told him that he believed the oil measures lay under the Buena Vista Hills and that he thought they lay very deep under the Elk Hills (R. 320). Owen before 1904 spoke several times about the oil showing in section 32 of 30-24 and from a conversation concerning the Elk Hills as oil territory he knew that Owen regarded them as such (R. 321). Owen seemed to feel quite sure that there were oil lands in the vicinity of oil croppings on 32 of 30-24. The locations in the Elk Hills in 1901 and 1902 were not made only by parties who were speculating in the possibilities of oil. Most of the operations were carried on under the advice of a geologist and he considered Josiah Owen one of the best in the field. All of his locations were made on the advice of competent men, among whom he considered Treadwell and Youle under whose advice he and his associates made locations in 1904 (R. 332). The formation of the lands in 30-23 and 30-24 is shale, sandstone and clay, fuller's-earth and gypsum and in that formation fuller's-earth and gypsum generally occur in conjunction with oil. Mr. Owen, he said, thought that the oil formation dipped very fast from the west towards the east so as to make it deeper in the easterly end of the field. If Mr. Owen heard of any seeps he looked them up. Witness and Owen were stockholders in the Eight Oil Company which located even-numbered sections in 30-23 and 30-24 for oil. Owen furnished information of a geological

character of the holdings of the Eight Oil Company. "He showed several of us the fuller's-earth and gypsum there and told us that it was possible that the oil measures lay under there at a depth that could be reached. At that time we didn't think it possible at the depth that he stated to drill profitably for oil. We had confidence in his report so far as the existence of minerals was concerned. Owen put up his share of the money for doing the development we did there and the locations of the lands and the organization of the company. Those lands were located for oil, fuller's-earth, gypsum and other minerals." The value of that land, meaning the lands in 30-23, is for mineral (R. 323-4). Owen told him "if the railroad selected those lands they would be selecting mineral lands. In other words, they had no right to select them as he had reported them as mineral land." (R. 325.) It was in 1903 or the early part of 1904 that this conversation took place. Owen said he was employed for the purpose of examining lands and classifying them as to their mineral character. Witness testified that, as a man of experience in the oil-fields, he would not make a location of land which had no indication of mineral value on the ground at that time (R. 327). "Mr. Owen said he belived the Elk Hills might contain oil. He said the oil measures lay under them and he thought that they were probably so deep they could not be reached and made to pay. I had some conversation with him in reference to some land in 30-23 in which he told me that oil could be reached at 3,000 feet or over and we didn't drill because we

didn't figure that it would pay to drill for it." We regarded 3,000 feet as prohibitive from the standpoint of cost. "Mr. Owen said there was a good chance." Continuing, witness said: "At a number of places through the Elk Hills running from northwest to southeast I found evidence of an anticline. There are two on the east part of it and one on the west. I have heard it said, although I have never been able to trace it, that there are evidences of two at the west and that they come together at the east. I know what an anticline is. I found both slopes of the anticline running through the Elk Hills. Both slopes are revealed in those canyons and are very well defined. The north slope is best defined. I found probably twelve or fifteen indications showing the north slope of that anticline. I did not find the south slope in so many points, but where you find the north slope you can find the south slope. I never went in there to find the anticline particularly, but I noticed it as I was going through. I am certain that I found stratification showing the south flank of the anticline. The south anticline was quite plain in section 30 of township 30 south, range 24 east, and you can find indications of that south slope of the anticline in section 32, township 30 south, range 24 east, where I found this blow-out. You find the formation dipping to the south and to the north. The thickness of a section of the stratification revealed on the south side was probably fifty feet. That line of stratification dips to the southwest. The materials shown in these strata are sandy clay and fuller's-

earth. The fuller's-earth strata show very prominently." (R. 328-9.)

C. F. Haberkern, engaged in the development and prospecting of lands in the Elk Hills and vicinity, testified that in August or September, 1904, he, with Josiah Owen, went all over the Elk Hills and at that time they visited the oil seep in section 32 of 30-24. Owen, he said, made a careful examination of the lands and they discussed the possibility of finding oil, fuller's-earth and gypsum. Owen said he thought there was oil there, but that it was very deep and would not pay to go after it then. From three to four thousand feet. It would not pay at that time because oil was very low at that time (R. 354). He testified that the lands in 30-23 looked good enough to him to afterwards locate them and he and his associates, in pursuance of the examination made by him and Owen, later located the lands in 30-23. They located on the even-numbered sections and, although he wanted to locate the odd-numbered sections also, they did not do it, because Owen told him he was working for the railroad company and not to take any railroad land, meaning, of course, the odd-numbered sections (R. 350). This witness was also a stockholder in the Eight Oil Company. When a particular section was pointed out by the witness to Owen the latter said: "Mr. Haberkern, don't locate that land. It is railroad land. I am working for the railroad company myself and it wouldn't look good for me to locate the land"; and it was marked "S. P. R. R." on a



map he had with him. This was in August or September, 1904, when Owen also said to him that the odd-numbered sections in the Elk Hills were as good as the even; that the railroad lands in that township (30-23) were just as good for mineral as the even sections (R. 355).

H. A. Blodgett sent Jewett & Blodgett's oil expert, Youle, into the Elk Hills to make an examination. Youle reported that the Elk Hills showed indications of being oil bearing and Blodgett and his associates made locations there in December, 1899, which they kept up for six years, spending a good deal of money on them. He believed that the indications in the Elk Hills were good and had never had any reason to change his opinion (R. 367). It was the intention of himself and associates to prospect that country and develop it for oil (R. 371). The reasons for not developing the property in the Elk Hills was that there was no market for oil, the price being so low that, if he had had a thousand barrels on hand in the Elk Hills, he could not have transported it and it would not have been worth a cent (R. 390). The reason he did not drill in the Elk Hills was that oil had no value (R. 391). The only development that he did was right alongside of the railroad track which gave the oil a little more value under the conditions then existing than if it was in the Elk Hills (R. 392).

There was considerable oil excitement in that country in 1900, '01 and '02, when a great many competent oil men came in and located lands for oil (R.

383-4). While this witness was developing the territory lying at the foot of the Temblor Range near the outcrop at the time in question, he did not consider that more valuable for oil than the Elk Hills because the latter were further away from the outcrop; indeed, he said the Elk Hills were east "and in exactly the right direction"; that lack of transportation facilities alone underlaid their failure to drill in the Elk Hills (R. 392, 395).

H. P. Dover, although having been in the Elk Hills before, went into the Elk Hills in the Spring of 1903 or 1904 to locate oil lands and did locate several claims. He saw the seepage in 32 of 30-24 (R. 461). He found shale in the Elk Hills which formation he thought was favorable for oil and had no reason to change his opinion at the time of testifying. The chief value of the Elk Hills is for oil, if for anything (R. 462, 467). He located section 30 of 30-24 near the gas seepage or blow-out. The Elk Hills, he said, looked to be pretty good territory to him and looked promising to all of them, speaking of his associates. They believed and thought there was oil there, the same as in the Midway where they had drilled, but didn't put any money into it because oil was down so cheap (R. 468).

C. F. Whittier in 1902 talked with personal friends as to the situation in the Elk Hills and intended to go in there and make some locations and do development work and get a patent to the land, but was unfortunately crippled so that he could not go over there then (R. 471-472). It was the general

impression of the oil men of his acquaintance around McKittrick as early as 1904 that the Elk Hills would be proven to be oil bearing. He regarded them as good prospective oil territory and was making arrangements in 1904 to get money to locate some of the land and do the assessment work which the law required at that time and get patent; but an injury to his knee kept him confined to the house several years and prevented him from doing so (R. 474). He regarded the Elk Hills as no more of a gamble than other oil ventures, though more of a gamble than it would be at places closer to the croppings. Assuming that there is a cropping in 32 of 30-24, he stated that there was no more of a gamble in drilling on lands within two or three miles of that or in that vicinity than there was on other lands (R. 477).

F. Barrett first went into the Elk Hills in 1899 in the employ and interest of a gentleman by the name of Hilbish who paid him one hundred dollars a day and his expenses to go down there. He rode over the entire township diagonally finding oil indications at two or three places where there had been seepages. As the result of his investigation he made in writing a favorable report on the Elk Hills and recommended them as good oil bearing territory and had had no reason since that time to change his opinion (R. 479-481).

N. C. Farmum had been many times in the Elk Hills and three times before patent. He went there for the purpose of making examinations and took

other means of satisfying himself aside from his own personal examinations. In 1899 he was satisfied that there was a fair chance of getting oil there. He went over 30-23 and was on every one of sections 15, 17, 19, 21, 23, 25, 27, 29, 33 and 35 and his opinion as to the oil character of the land included these sections as well as the even-numbered sections (R. 496-497). He was interested with Jewett & Blodgett for whom Youle made his investigation and report. That report was very favorable and stated that there had undoubtedly been oil in 32 of 30-24 and that the country between there and section 14 of 30-22 had the appearance to him of oil land (R. 497-498). He formed the opinion absolutely that the territory in the Elk Hills was oil territory, having had no reason to change that opinion and still believing it to be oil territory (R. 499). He knew that his associates did not regard the land which they located as merely a prospect. He and they considered it better than a prospect. They spent a good deal of money there and a man does not usually spend a great deal of money on a prospect. They were assured in their own minds as well as they possibly could be without drilling that it was oil territory; and he still considered it as such. Knowing of the conditions then existing, they would have sunk a well for the reason that they had determined to drill a hole in the Elk Hills no matter what the cost as far as they could go and as far as money would go. That was their absolute determination, not to be deviated from until the government withdrew the land. When the government withdrawal



was removed in 1904, the conditions had changed very materially from 1901 and 1902, money was hard to get, the price of oil was so low it didn't pay to produce it and transportation conditions were inadequate (R. 512).

C. W. Lamont regarded the Elk Hills country prior to patent as good oil territory and the only conclusion to which he had since come was that it was better than he thought it was in the first place (R. 581).

W. H. Hill was a member of the firm of Barlow & Hill who in 1904 published a map of the California oil fields at Kern River, Coalinga, Sunset, Midway and McKittrick. He stated that on his maps a drilling rig is indicated by a circle with a dot in the center; a derrick is indicated only by a circle; where oil was struck, the whole interior of the circle is black. If the well was abandoned, four short marks are made on the opposite sides of the circle. The date on the maps is 1904 and they are correct pictures of the oil conditions in the particular townships which they purport to picture at that time. He testified that his firm published 2500 copies and sold all of them, probably two-thirds in and around the oil fields in Kern County and the balance in Los Angeles and San Francisco excepting a few which were sent East by mail and to the old country. This map was completed and published before August 31, 1904 (R. 110).

C. A. Barlow, the other member of the firm of Barlow & Hill, testified that the Southern Pacific

Company, as well as almost everybody else, bought these maps from his firm and that he presumed that the Southern Pacific Company began purchasing them from the time when he began to publish them (R. 2033-2034). The maps in question were introduced in evidence as plaintiff's Exhibits Ha, Hb, Hc and Hd.

These maps, the general sale and distribution of which have been shown, delineate the conditions with reference to seepages and development along the Temblor Range prior to 1904. They show a large number of seepages and wells and must have sharply called attention to the oil character and oil possibilities of the lands in general in the San Joaquin valley and Kern County and particularly around McKittrick.

The following testimony is from witnesses in behalf of appellants:

James A. Ogden testified that, while he did not make the locations and was not in the country when they were made, he had some locations at one time in the Elk Hills. He could not say that at that time he considered the Elk Hills to be oil land, as he was not an oil man and thought very little about it. He had not heard oil men discuss the Elk Hills as possible oil land, but there were a great many people going in and locating land there (R. 1982-3).

D. S. Ewing did not think that there was much general opinion in 1900-1901 as to how far into the val-

ley the oil went. The idea was that from the outcrops of the oil sands along the easterly side of the Coast Range mountains the stratification would dip at certain angles toward the plains and that the closer you kept to the outcrops of the oil sands on the hillside the more certainly you would strike oil, but in less quantities; and the further you got on the dip and the deeper down you went, if you struck oil at all, you would get it in better quantities (R. 2250). He was not a geologist and made no examination of the Elk Hills. He looked for outcrops of sand or other indications of oil and found nothing that attracted his attention or fancy to make him think there was oil there (R. 2251).

Robert E. Graham testified that it was a general idea among oil men from 1901 to 1904 that the oil was along the edge of the hills and he always figured that there was oil out in the flat, but that it would be deep; and that he guessed that everybody, the majority of them, anyhow, figured the same way (R. 2132). He didn't think the Elk Hills oil land; but he didn't know (R. 2133).

E. W. Kay testified that in 1901 the general impression among oil men with whom he came in contact was that the oil territory was around through the valley from McKittrick to Sunset along the edge of the main Range (R. 2085). In 1901 he made a trip into the Elk Hills with two other men hunting for oil lands, but found no indications of oil and made no locations (R. 2085). He was looking for

croppings of oil-sands and at that time they probably would have been a conclusive indication to him of the oil character of the land (R. 2086).

M. H. Whittier testified that up to 1905 there may have been some people who considered the Elk Hills as oil lands, but that he was not particularly interested in them and never had been; that there was a time when people thought the Elk Hills oil territory and that the Associated Oil Company went in there by the advice of very good people, but that he thought they were kind of sick of it (R. 1985).

J. P. Kerr came to the conclusion in 1901 that the Elk Hills country was too much of a "wildcat" for him to tackle (R. 2124). He thought the formation stood up too steep to reach far out into the valley that runs towards the Elk Hills and he thought that that opinion was entertained by every oil man there (R. 2125). He said, however, that, if he had in 1901 found the stained sand formed by impregnation of oil in 32 of 30-24, it would have been evidence to him of the existence of petroleum and he would have considered that pretty good "wildcat" territory. Even if the oil had been dried up fifty years, he would have considered it a good chance to drill, because he would have expected to find oil below the surface (R. 2127).

F. H. Hall testified that in 1901 some thought that the oil belt would run out into the flat, while others contended that, if you got down off the hills, no oil would be obtained at all. When he first went into the Elk Hills, he had no fixed opinion. He thought



there might be a possibility of oil being there (R. 1826).

There were other witnesses for appellants who testified in similar vein.

2. **Belief of appellants in the oil character of the lands in suit.**

Obviously the belief of appellants can only appear and be proven by the belief of their agents and officers.

**John R. Scupham's belief:**

John R. Scupham had been a civil engineer in the employ of the Central Pacific and Southern Pacific Railroad companies. About 1874 he was recalled from field work and was given an office in the engineering department and served as consulting engineer to the directors of the two railroad companies named, the Southern Pacific Company, The Western Development Company and the Pacific Improvement Company. He reported to the directors of the several companies who were Leland Stanford, Charles Crocker, Mark Hopkins, C. P. Huntington and afterwards D. D. Colton, Judge F. B. Crocker, Colonel C. F. Crocker and A. N. Towne, the last named being general manager of the Central and Southern Pacific railroad companies. He examined mineral lands in which these companies or their directors were interested (R. 584-585). In 1887 he was asked by Mr. Towne if he thought that the asphalt deposits west of Bakersfield would justify the building of a road in there and was directed to

inspect the deposits and report to Mr. Towne. After viewing the asphalt deposits around Asphalto, now McKittrick, he went to the southwest into the pass between the hills and examined the country lying to the southwest. He went into the Elk Hills where he found seepages, discovering the best oil seepage of all in section 32 of 30-24. He examined the land as he passed over it and thought that it was underlaid with oil. On his return to San Francisco he described to General Manager Towne what he had seen at Asphalto and then told him that he thought "those hills lying to the east were overlying the oil measures and that they would turn out to be very important in their future development", referring to what are now called the Elk Hills. Mr. Towne sent for Colonel C. F. Crocker and, when Mr. Crocker came in, said to him: "Scupham thinks those hills south of Miller & Lux' ranch are overlying an oil deposit" or words to that effect. Mr. Crocker replied: "Well, it is a good thing that there is some value of that kind in that land, otherwise it would be a very poor asset for the company." Colonel Crocker, Mr. Towne and Scupham sat down together and Scupham at the request of Colonel Crocker went into details and explained thoroughly the reasons for his opinion. He thought at the time that the Elk Hills were valuable lands and much more important than the lands lying to the west and north, so stating to Towne and Crocker (R. 587-8).

His impression was that in this conversation he informed Mr. Towne and Colonel Crocker that the

Elk Hills were better oil lands than those around McKittrick because the formation sloped from McKittrick towards them, while to the northwest and west it was faulted and badly fractured and not so likely to be productive of oil as where the formation was more uniform in its slope as in the Elk Hills (R. 596). Of course, he did not know mathematically that the oil was there in paying quantities, but he thought from the manifestations which he observed on the surface that such was the case. The seepage in 32 of 30-24 indicated most positively that there was oil in its vicinity. It was a fresh seepage and not in an exhausted oil sand. It showed freshness of the outflow of oil, the stain being a fresh stain, and, while he could not detect actual oil, the stain was necessarily recent and there had not been complete evaporation of the oil—a condition which he did not think could obtain in a bed of oil sand that was not productive (R. 597).

**J. B. Treadwell's belief:**

J. B. Treadwell was first sworn in this case as a witness in behalf of the government and testified that from the Spring of 1893 until the Summer of 1903 he was employed by the Southern Pacific Company in developing and producing oil for them. He knew Collis P. Huntington, H. E. Huntington and Julius Kruttschnitt and acted under their orders; subsequently under Mr. Hayes and E. H. Harriman. He was succeeded by Professor E. T. Dumble (R. 424). Subsequently Mr. Treadwell was called as a witness for appellants (R. 3413).

When on the stand as a witness for the government Treadwell testified that at different times he caused lands of the Southern Pacific Railroad Company to be withdrawn from sale by the land department of that company, explaining that he did this for the reason that Jerome Madden, the land agent of the company at that time, had through ignorance sold valuable oil lands as agricultural lands and at agricultural prices. On cross-examination he stated that he knew the Elk Hills and that none of his withdrawal orders took in any portion of them, saying that he had been over in the Elk Hills in connection with some location notices in which he was interested and, after seeing the land, did not consider it at that time oil land of any value. Accordingly, he did not ask to have any of the lands there withheld from sale (R. 435).

On re-direct examination, while repeating that he had at no time recommended the withdrawal from market of lands in the Elk Hills, he admitted that he may have included section 31 of 30-23 in a withdrawal. He said he did not consider that in the Elk Hills (R. 439). During the interval of months between the time when Treadwell was on the stand as a witness for the government and his resumption of the stand as a witness for appellants, Exhibit 115 had been produced in evidence showing the withdrawals made by him and bearing the legend "All shaded tracts reserved from sale because in or near oil territory." When confronted with this Treadwell admitted that the shaded tracts included the



following sections in township 30-23: 3, 5, 7, 9, 13, 14, 17, 31 and the NW $\frac{1}{4}$  of 19, the very township in which lie the lands in suit; also in township 30-24 sections 1, 7, 19, 21, 23, 24, 26, 35; also several sections in 31-24 (R. 3423).

Treadwell admitted that at least eight sections in the Elk Hills in 30-24 were reserved from sale because in or near oil territory and that all of township 30-23 in the Elk Hills was included and reserved from sale except those sections which appeared to be unsurveyed (R. 3424; see also 3458).

Thus it appears that, while Treadwell as a witness for the government denied his belief in the oil character of the Elk Hills, his action in withdrawing lands therein from sale prior to patent proves that he thought them oil lands; for, if he did not think them oil lands, why would he have withdrawn them from sale?

The record shows that Treadwell himself prior to patent made mineral locations in the Elk Hills, two miles from the lands in suit. Section 33 of 30-24 was located December 13, 1899, by J. B. Treadwell, May Treadwell, E. D. Treadwell, C. C. Boynton, F. Boynton, W. L. Hardison, Guy Hardison and R. S. Ashton, all of the seven last named except R. S. Ashton being related to him (R. 3426-7). He stated that at that time he evidently believed that it was mineral land (R. 3427). At the same time he made several other locations in the Elk Hills (R. 3427-8-9). This section 33 of 30-24 was patented to the Southern Pa-

cific Railroad Company in May, 1902, under patent numbered 111, Exhibit "6-A" (R. 3452-3-4-5-6). Thus, in 1899 Treadwell, oil expert and geologist of the Southern Pacific Company, located for petroleum purposes the very section of land which his employer, the railroad company, secured in 1902 under an agricultural patent.

It is true that Treadwell testified that, after examination of the lands in the Elk Hills covered by his location, he came to the conclusion that they possessed no value for oil; but this self-serving declaration does not comport with the testimony of other disinterested witnesses nor with his own acts in reserving these lands for oil purposes.

John Jean testified that he reported to Treadwell his discovery of the seepage in 32 of 30-24 and accompanied Treadwell and L. G. Sarnow to inspect it in 1899. Treadwell and Sarnow examined the oil sands and Treadwell said they looked good. On the strength of that discovery Treadwell, Sarnow, Jean and others made locations of the lands about there. L. G. Sarnow testified that, upon inspection of the seepage in question, he thought the land good for oil and that Treadwell, who was a mineralogist and with him at the time, thought it was good for oil, but that both of them thought it was deep. He corroborated Jean that on the strength of that showing Treadwell and Jean and he located the land (R. 135-136).

Treadwell testified that, if he said anything to

Sarnow about the possibilities of oil in the Elk Hills, he said it was not good (R. 442), thus bringing himself into sharp conflict with Sarnow.

It would be difficult to conclude that an experienced oil man, who in 1899 and 1900 was withdrawing from sale and reserving for oil purposes for his employer lands immediately in the Elk Hills and who himself was seeking by mineral locations to acquire lands there, did not believe in their oil character. His words as a witness do not comport with his acts either as an individual or as an officer and servant of appellants. Actions speak louder than words and the government appeals from his words as a witness to his acts as a geologist of appellants and as an individual bent on private gain—to his withdrawals and to his locations.

**E. T. Dumble's belief:**

Professor Dumble became consulting geologist of the Southern Pacific Company in 1897, first becoming acquainted with the California fields in 1901. Formerly he had been located in Texas. From 1901 he acted in an advisory capacity to the manager of the Southern Pacific Company (R. 2896-7-8-9) and was in charge of all matters pertaining to oil—he chose Josiah Owen in August, 1902, to take charge of appellants' oil territory in California (Rd. 2900); Treadwell, the oil expert of appellants, left California in 1903 and Dumble put Owen in his place (R. 2907); in March, 1903, he employed Frank M. Anderson as a geologist for the Southern Pacific

Company (R. 2909); when the Kern Trading & Oil Company was organized, he was put in charge (R. 2911) and determined what Southern Pacific Railroad Company lands were to be transferred to it to be developed for oil (R. 2911). In his own language, March 18, 1903, he opened an office in San Francisco and "took active charge of the oil operations of the Southern Pacific Company" (R. 2907). When he testified in the case in 1912 he was still in the employ of and bore this responsible relation to appellants (R. 2896, 2979) and drew a salary of ten thousand dollars per annum (R. 2951).

Professor Dumble repeated many times the statement that he had never been in the Elk Hills (R. 2959-3079).

After the Kern Trading & Oil Company was organized, Mr. Kruttschnitt placed in his hands the examination of all of the Southern Pacific Railroad Company's oil lands that were to be turned over to it. His testimony at this point is as follows:

"I determined that *the lands which we believed to be oil lands*, owned by the Southern Pacific Company, and also lands or oil lands which had been bought by Mr. Treadwell for the Southern Pacific Company, should be turned over to the Kern Trading & Oil Company. That included other lands than those which were actually developed by wells. The company owned everything that we thought at that time *would be capable of producing oil commercially*; I don't mean capable of producing oil commercially at that time. Most of the lands was quite a way from any producing wells, and it



was taken up with the idea of furnishing the Company with oil for a long period."

Special attention is invited to the test as defined by Professor Dumble to be applied to the lands to be transferred: "lands which we believed to be oil lands".

Again, in his letter of September 21, 1903, to Mr. Kruttschnitt he recommended that the Kern Trading & Oil Company "should acquire by purchase or lease such lands now belonging to the Southern Pacific Company *as we consider valuable for oil purposes*" (R. 2913). In another place he testified: "Mr. Owen and I decided on a list of lands that were to be transferred to the Kern Trading & Oil Company" (R. 2925). When he referred to the Southern Pacific lands he meant the Southern Pacific Railroad Company's lands (R. 2912).

Exhibit 118 was a letter written by Dumble to Owen for the purpose of getting the latter's ideas as to what lands should be included in the lease (R. 2910). Owen replied by maps (R. 2910) and Dumble included in the lease every parcel of land recommended by Owen.

Now, the lands transferred to the Kern Trading & Oil Company included section 31 of the very township in which the lands in suit lie and cornering with one of the sections in suit (R. 3064-5), Dumble testifying that he included it because Owen had put it on his map "as possible oil territory because of an anticline that ran through it" (R. 2953).

It is hardly conceivable that in 1903 Dumble and Owen could have considered section 31 oil land without so considering other land contiguous to it. Dumble says that Owen considered section 31 "possible oil land because of an anticline that ran through it," as just noted. This leads to two observations: First, that Owen does not appear to have limited it to "possible oil land", Dumble himself having stated that the test was "what we consider valuable for oil purposes" and it plainly appearing that the Kern Trading & Oil Company was not organized for the purpose of dealing in oil lands, but exclusively to develop oil for fuel purposes—it further being shown that in his report to Mr. Kruttschnitt of the lands to be included in the lease Dumble himself states that the unprospected lands are "*simply probable oil lands which, from our investigations, we believe will prove valuable*" (R. 2927). Second, that the presence of the anticline was, according to Dumble, the reason for the inclusion—of course, he naturally had in mind also the relation of the section to the proven oil territory. In view of the fact that an anticline runs through the lands in suit and was plainly delineated on Owen's map, Exhibit 157, and that the lands in suit have exactly the same relation to the proven oil territory as section 31, the conclusion is irresistible, his words and statement as an interested witness to the contrary notwithstanding, that Professor Dumble must have believed the lands in suit oil lands. He says that he put section 31 in "because Owen put it on his map"—he followed Owen's opinion, agreeing with him necessarily as to

the significance of the presence of the anticline taken in connection with the surrounding conditions. It will hereafter be conclusively shown that Owen regarded the lands in suit as oil lands and it is fair to assume that Dumble, having never been in the Elk Hills, as he says, but following Owen in all other known instances, must have shared the opinion of Owen, who was often in them, of the oil character of the Elk Hills. Owen at that time was working under Dumble and "had charge of the oil fields" (R. 2907). Dumble had a very high opinion of Owen, saying that he was "a very remarkable man" and "had a faculty of carrying underground conditions in his mind more perfectly" than any man whom he had ever known (R. 3037). Then, too, Dumble, in his letter of February 2, 1904, to W. F. Herrin, chief counsel, concerning the lands to be leased to the Kern Trading & Oil Company, writes that "none of the lands in the McKittrick . . . districts . . . have been actually proven by wells and, while we believe that there is a strong probability that all of the lands here mentioned will produce oil, it will require drilling to make this certain" (R. 2930). Two observations become pertinent: one is that "we" evidently referred to Dumble and Owen; the other is that Dumble and Owen believed—and it is belief that is the subject under discussion—that section 31 of 30-23 would produce oil.

Dumble made several trips through the oil lands about McKittrick and elsewhere with Owen (R. 2919). September 21, 1903, he wrote Mr. Krutt-

schnitt a letter in which he divided the lands into three classes, the third, as he wrote, depending "in part upon the continuance of normal dips and conditions, but in addition it represents untested anticlinals which show good indications of oil" (R. 2913). Undoubtedly, the Elk Hills anticline, so conspicuously traced on Exhibit 157, Owen's map, was one of those in Dumble's mind, although he as a witness asserts the contrary (R. 3075), saying that the letter in question showed which anticlines he intended to include. But the letter includes section 31 of 30-23 which is in the Elk Hills.

Professor Dumble testified that, if he had known in 1902 of an actual oil seep in 32 of 30-24, that fact, taken in connection with the anticlinal structure found by Owen, would have caused him to regard "the lands in that vicinity in the Elk Hills as favorable to expect the occurrence of oil there" (R. 3039). It is inconceivable that Owen did not communicate this knowledge to him. It will be convincingly shown hereafter that Owen knew of and believed in this seepage.

Admitting that the lands in suit were surrounded on all sides by "shaded" or withdrawn oil lands (R. 3040) and that the reservations from sale of lands because in or near oil territory extended six miles farther from the outcrop than the lands in suit, Dumble stated that, when he took charge of the geological affairs of the Southern Pacific Company in California in reference to oil lands, he did not



disturb the policy, established before he took charge, of holding in reservation from sale because in or near oil territory all of the lands in 30-23 and 30-24 owned by the Southern Pacific Railroad Company; and he further stated that, if the lands in suit had been patented and included in a reservation, he would not have disturbed the reservation (R. 3003-4-5).

George A. Stone, of whom more will be related hereafter, was in 1903 and 1904 assistant to Eberlein, the acting land agent, who filed selection list 89 and made affidavit of the non-mineral character of the lands in suit, and took part in the preparation of that list under the direction of Eberlein. At the time of testifying he was a pensioner of the Southern Pacific Company (R. 1028). As a witness for the government he made the following statement:

"I regarded the selection of these lands as irregular. Mr. Dumble, as the geologist, I thought pressed the selection for reasons best known to himself. I supposed, as geologist, he thought they were oil lands. He pressed the selection of this land probably within thirty days prior to the list in 1903, not earlier than September or later than November." (R. 1030.)

Dumble denied this; but he was a deeply interested witness, being in the employ of appellants and himself and his acts under fire. No possible reason can be assigned for a false statement at this point by Stone; for he was a pensioner of the Southern Pacific Company and stood to gain nothing by swearing contrary to its interests, but was in danger of losing his pension.

What possible motive could have induced Dumble to press the selection of these lands except belief in their oil character? He had charge of the oil affairs of the Southern Pacific Company and was concerned only with oil lands and the production of oil.

C. W. Eberlein, the acting land agent who made the selection of the lands in suit and the affidavits of their non-mineral character, testified that in 1904 he protested against the practice of Professor Dumble and Dumble's men of examining lands not yet patented to the railroad company. He made protest to Judge Cornish, his chief in New York, Vice-President of the Southern Pacific Company, and to C. H. Markham, General Manager of the Southern Pacific Company, taking the position that examinations so made would charge the company with notice of the mineral character of the examined lands (R. 1091-2-3). These protests began in 1904 and continued into 1908. On February 22, 1908, Eberlein wrote a letter to Henry Conlin, his assistant and subsequent successor as acting land agent, which is set out on pages 1094 and 1095 of the record. This letter was written in New York where Eberlein was at the time and because of its importance is here set out in full:

“February 22, 1908

“Mr. Conlin:

“The New York Office has forbidden the giving out of any more printed lists of lands because of the unsatisfactory condition of our titles which must not be disclosed. The examination of our S. P. lands not yet patented by our oil experts must be stopped as information that

they may obtain or give as to mineral character prior to patent will forever prevent our getting titles. Should Mr. Calvin call for any lists please take this memo. to him and explain our situation and refer him direct to the New York office. Please advise him too of the pressing necessity of the return of lists sent in a year ago for entry of lands to be reserved for company purposes. Mr. Dumble and his men should not be furnished by us with any data whatever except as to *patented* lands. For reasons above given such information will be embarrassing to them and us and may make them witnesses against this company in mineral contests hereafter.

(Signed) "CHARLES W. EBERLEIN,  
"Acting Land Agent."

(R. 1094-5.)

The statement in this letter was but a continuation of the accustomed protesting which Eberlein started at the time when the Kern Trading and Oil Company lease was presented to him for signature (R. 1098).

This matter is referred to because of its bearing upon the activity of Dumble and his assistants and is significant as showing that in advance of patent they were examining government lands for the purpose of ascertaining their mineral character. It serves not only to show Eberlein's state of mind, but to throw light upon the purposes for which Dumble was employed by the Southern Pacific Company.

While Dumble testified that he had nothing to do with and no interest in the selection of the lands in

suit (R. 3014), nevertheless on December 7, 1904, five days before the date of the patent, he wrote a letter to W. H. Bancroft, Acting General Manager of the Southern Pacific Company, in which he stated that he had had a conversation with Eberlein and that "it seems for reasons of policy regarding certain unpatented lands that it will be best not to execute the lease of lands between the Southern Pacific Railroad Company and the Kern Trading and Oil Company at present", suggesting that the lease of lands in the McKittrick district be held up for the present (R. 1072-3). In March, 1907, a controversy having arisen between Dumble and Eberlein, the former wrote the latter a letter in which he undertook to refresh Eberlein's memory concerning events connected with the attempted Kern Trading & Oil Company lease of 1904 (R. 2855-6-7-8). The pertinent part of the letter in question follows:

"Early in December we had a further conference on the matter and you explained that you were rushing certain lands for final patent and that the immediate execution of the lease showing our idea of what were oil lands might interfere with you and we agreed to defer the execution until that danger was passed."

From the foregoing it clearly appears that in December, 1904, Dumble shared in the apprehension of Eberlein that the Kern Trading & Oil Company lease, conveying, as it did, to an oil development company railroad lands adjoining the lands in the list of lands to which Eberlein was endeavoring to secure patent, would endanger the success of the effort.



Accordingly, Dumble says, "we agreed to defer the execution until that danger was passed". In his testimony Dumble seeks to belittle the significance of the danger in question; but the letter is evidence that he regarded the danger as real and it is apparent that the only danger which he and Eberlein apprehended was the failure to secure patent to the lands in suit because of action on the part of Dumble and others which betokened their belief in the oil character of lands in the immediate vicinity of the lands in suit and consequently of the lands in suit themselves. Reservations from sale, as has been shown, were made of lands "because in or near oil territory", showing that appellants' geologist predicated the oil character of unproven lands upon the proximity thereof to proven lands. If Dumble did not share in Eberlein's belief in the danger presented by the Kern Trading & Oil Company's proposed lease, why should he have recommended to the General Manager that the execution of the lease be deferred? He could possibly have meant nothing other than that their execution should be deferred until the patent was secured, the idea being that the issuance of the patent would mark the passing of the danger. If Dumble did not believe in the oil character of the lands in selection list 89 and now in suit, he could not have sympathized with Eberlein's fear.

Dumble's testimony is contradictory of his acts and brings him into open conflict with the witnesses who, unlike him, were under no inducement to speak other than the exact truth. Why should Eberlein

have given false testimony in behalf of the government? Why should Stone have perjured himself in opposition to the interests of the company which paid his pension? Professor Dumble's credibility may be tested both by the agreement or disagreement of his testimony with that of other witnesses and by the light which his own evidence concerning himself and his acts throws upon the transactions in which he was concerned.

Dumble admitted the ownership of 2667 shares of the capital stock of the Eight Oil Company which owned or claimed to own sections 20, 22, 24, 26, 28, 30, 32 and 34 of township 30-23, the township in which the lands in suit lie. These sections are immediately interspersed with the sections in suit and adjoin them. That company also owned or claimed to own sections 26, 30, 32 and 24 of township 30-24, all in the Elk Hills; as also sections 4 and 8 of township 31-23. It is true that Dumble did not acquire his stock in the Eight Oil Company until 1909 and that he stated that he never heard of the Eight Oil Company claiming any lands in 30-23. His testimony concerning his connection with the Eight Oil Company is set out on pages 3044 et seq. and is interesting reading. He states that Josiah Owen, a geologist under him, induced him to put money in the Eight Oil Company and that he absolutely had nothing to do with the taking up of the sections in the Elk Hills. Such ignorance on the part of so eminent a geologist and one versed in oil affairs in the region of McKittrick is somewhat astonishing.

It would seem that one who held so large a number of shares in a company whose success was dependent upon the sound advice of oil geologists and who had received one dividend of twenty thousand dollars (R. 3049) would have taken the pains to acquaint himself more intimately with its transactions and business than Professor Dumble's testimony would lead one to believe that he took. It is hardly to be believed that the Eight Oil Company, of which Professor Dumble was one of the largest stockholders, would have sought to acquire several thousand acres of land in the Elk Hills without submitting the matter to him and it is a fair inference that what was done was done with his knowledge and upon his advice and, if this be true, it follows that in 1908 at least the consulting geologist of the Southern Pacific Company believed in the oil character of the lands interspersed with and adjoining the lands here in suit.

Professor Dumble owned one-tenth of the capital stock of the Buena Vista Land and Development Company, that company claiming to own a great deal of land in the Buena Vista Hills and vicinity that was taken up under agricultural scrip, having bought from S. P. Wible scrip title to five or six sections. When examined about these matters Professor Dumble admitted that the Buena Vista Land and Development Company was seeking to secure patents to lands in the vicinity of the Buena Vista Hills as agricultural lands the while he knew that they were mineral or oil lands. Asked if he did not

think that it was his duty as a stockholder in the Buena Vista Land and Development Company, believing as he did that these lands were petroleum lands, to disclose his belief to the United States Land Office where the contest was pending, he replied: "I don't consider that I have any duty whatever in the premises" (R. 3055-6-7-8-9).

It is submitted that the point of view of Professor Dumble as shown by his attitude towards the effort of the Buena Vista Land and Development Company to secure agricultural patents to lands known by him to be mineral is marked by mental obliquity and that it furnishes a sound test by which to determine the credibility of his testimony in this case. The government insists that the evidence, fairly considered, proves that he in 1904 entertained the belief that the Elk Hills, including the lands in suit, were oil lands.

#### **Josiah Owen's belief:**

Josiah Owen, according to the testimony of his son, Erwin W. Owen, was a geologist and mineralogist and from 1902 until the time of his death, December 19, 1909, was employed by the Southern Pacific Company or the Southern Pacific Railroad Company or by both and by the Kern Trading & Oil Company as a geologist. He had been in the employ of the Southern Pacific Company in 1898 or 1899 in Mexico, having prosecuted his work as a geologist for 35 years before that time and having gotten "his training in the hills together with what reading he could do". He reported to Professor



Dumble, who was consulting geologist of the Southern Pacific Company or the Southern Pacific Railroad Company. The witness, Erwin W. Owen, was the administrator of Josiah Owen's estate and in that capacity took and had possession of certain papers and letters belonging to his father, some of which were introduced in evidence.

It is now proposed to show the belief of Professor Owen in the oil character of the Elk Hills by reference to his maps, letters, declarations and his own locations or those of the Eight Oil Company in which he was a stockholder.

In September, 1902, Owen was ordered by Dumble to report to Mr. Kruttschnitt in San Francisco and he immediately thereafter began work in the region around McKittrick (R. 1609, 2900). March 25, 1903, Owen wrote Dumble the letter set out on pages 1615 to 1620 of the record and enclosed a map which was introduced in evidence as Exhibit 157. This map delineates the McKittrick anticline and the principal Elk Hills anticline. In the letter enclosing the map this is not called by Owen the Elk Hills anticline, but "the fold north of McKittrick". Of it he says:

"The fold north of McKittrick and running nearly parallel passes through sec. 5 and 9 between 11 and 15 through 13 of 30-22. This fold exposes the oil sands in several places and in some of the exposures the sands are strongly impregnated with Asph and producing wells ought to be found along this exposure, the asphaltum exudes through overlying clays in many places" (R. 1617).

In a report introduced as exhibit 4-R referring to the Elk Hills anticline, Owen says:

“Town 30 S, Range 22 E, M. D. M. The anticlinal fold mentioned as running through Town 30 S, Range 21 E continues through this township. This anticline is not as sharp as the McKittrick anticline and as a consequence the area of available oil sands are much more than the McKittrick fold. This anticline enters the township near the northwest corner of section 6 and leaves it near the corner of section 25. Two producing oil wells have been drilled in section 6 on this anticline and bituminous deposits are found in numerous places along the anticline.” (R. 1634.)

The reference here is to the fold north of the McKittrick fold and running nearly parallel, above referred to, and it is clear that Owen meant the Elk Hills anticline which on exhibit 157 he delineates as entering township 30-22 in section 6 and extending through sections 9, 20, 29, 28, 27, 26, 25 and 36 of township 30-23; and it is of this anticline that he says: “Producing wells ought to be found along this exposure”, thus indicating his belief in the oil character of some of the very sections in suit.

In 1904 Owen approved the list of lands to be transferred from the Southern Pacific Railroad Company to the Kern Trading and Oil Company, which list included section 31 of 30-23, the township in which the lands in suit lie (R. 1611-12-13-14), thus showing his belief in the oil character of a patented section adjoining the lands in suit which were then unpatented.

Professor Owen's knowledge of and belief in the oil character of the lands in suit prior to patent is shown by the testimony of numerous witnesses for the government who knew him at that time and came in frequent contact with him in the region around McKittrick.

M. S. Wagy testified that in 1900 he showed Owen sand taken from the seepage or blowout on 32 of 30-24 and that subsequent to that time, in 1900 or 1901, Owen said he thought that that country was good and later told him that it was oil territory (R. 182-3-4-5).

W. E. Ott testified that Owen told him that the territory in general from McKittrick to Sunset would be a great field (R. 277); that Owen went everywhere around that country examining land.

S. P. Wible testified that in 1903 and 1904 he went through the Elk Hills with Owen who had been there previously and was going to show him the outcrop on 32 of 30-24. Owen was examining and classifying Southern Pacific Railroad land and was going around the country in the vicinity of McKittrick for a year or more, seeming to be very well posted. He examined practically all the railroad lands in Kern county and in the Coalinga field, classifying them. He had examined lands in the Elk Hills in behalf of the Southern Pacific Railroad Company, having first gone there in the Fall of 1901 or the Spring of 1902 (R. 319). Wible had discussed with Owen the geologic conditions and oil possibilities of lands in the

vicinity of McKittrick a great deal and Owen was very familiar with the formations of that country and particularly with reference to the Elk Hills, including township 30-23, as well as the other townships there. Owen told him that he believed the oil measures lay under the Buena Vista Hills and thought they lay very deep under the Elk Hills (R. 320). Owen was acquainted with the Elk Hills anticline and knew of it before he and Wible went into the hills together. As early as 1901 there were two oil wells on section 6 of 30-22 and one on section 1 of 30-22 on the Elk Hills anticline. Before 1904 Owen spoke with him several times of the oil showing in section 32 of 30-24 and from a conversation concerning the Elk Hills as oil territory Wible knew that Owen regarded them as such (R. 321). Owen seemed to feel quite sure that there were oil lands in the vicinity of the oil croppings in 32 of 30-24. If Owen heard of any oil seeps he hunted them up, they being one of the main things he was looking after when Wible first met him. Owen carried maps or plats of the different townships in the Elk Hills and elsewhere and put down on them information that he obtained with reference to the mineral character of the land. Wible was intimately acquainted with Owen from 1902 down to the time of Owen's death (R. 322); and Erwin Owen, the son of Josiah, testified that Wible was his father's most intimate friend and that whatever he said of him could be believed.

Wible discussed with Owen the lands in 30-23 in 1904, about *the time when they were selected by list*



89, and *Owen told him that, if the railroad selected those lands, they would be selecting mineral lands; that the railroad had no right to select them, as he had reported them as mineral land*, this remark having been made on the road between the Elk Hills and Headquarter's ranch. No one was present but Owen and Wible and Owen stated that he had reported those lands as mineral lands. He was quite sure that this conversation took place in 1904 (R. 324-5).

Charles F. Haberkern knew Josiah Owen very intimately and had been in the Elk Hills with him as long as five days at a time. They looked all over the country and he showed Owen the minerals he found there (R. 349). In August or September, 1904, Haberkern and Owen went all over the Elk Hills from one end to the other on both sides of the slope. Haberkern knew township 30-23 and stated that in their examination they passed over the lands in that township which lie in the hills and constitute the south half of the township. (This includes the lands in suit.) They also went to the townships to the east and west of 30-23. The witness knew of an oil showing or outcrop or gas blow-out in the northwest quarter of 32 of 30-24. In August or September, 1904, he and Owen visited that oil seep and went all over the township, Owen making a careful examination of the lands, and at that time they discussed the possibility of that country for oil, fuller's-earth and gypsum. Owen told him that the land was very valuable for fuller's earth and gypsum, but that he thought that there was oil there, but that it was very

deep and it would not pay to go after it (R. 350). Owen told him that there was a possibility of oil in the Elk Hills, but that it was from three to four thousand feet deep. It would not pay at that time because oil was very low at that time.

Charles Brisco about 1901 or 1902 found a small breccia bed—dried oil, dried asphaltum on the east slope of the Elk Hills about 12 or 15 miles south and east of McKittrick and reported his discovery to several people. Sometime before 1904 he took Josiah Owen, who he said was a mineralogist for the Southern Pacific, over to this breccia bed in the Elk Hills (R. 335). “When I told him about my discovery he wanted to know if I could take him to it and I did.” Owen made a careful observation and examination of the lands as they passed through them. When they came to the breccia bed, he showed it to Owen. Owen lighted it (R. 336). Owen told Brisco what his business was—that he was an expert experting the territory as a mineralogist for the Southern Pacific. On the occasion in question while they were traversing the Elk Hills, *Owen told Brisco that it was good oil territory, saying that he thought it would be the best territory of any, but would be very deep.* He was not certain whether this conversation was on that particular trip. He had several conversations with Owen in regard to these lands before August, 1904. Owen took samples of shale or sand of the different sections they traversed. Just before giving his testimony Brisco went with F. Oskar Martin, a mineral inspector of the General Land

Officer, over the route which he followed when he took Owen into the hills and Martin made notes as they went along to identify places to which they went (R. 337); and Martin testified that the location of the oil seep to which Briscoe referred was in section 32 of 30-24 (R. 343-4).

Briscoe further stated that Professor Owen referred to the character of the oil which would be produced in the Elk Hills and stated that he thought it would be better, as it would be deeper, and there would be more gases in it (R. 338). Briscoe explained that he had some land located in the Elk Hills and, thinking that Owen had good judgment, "dug into him to ask about that land". He said to Owen: "I have got some land located there myself and I would like to have you go in there to see what you think about it." After getting Owen in there, he asked him two or three times what he thought of it and finally got this answer: "This is good enough, my boy. Hold on to it."

N. C. Farnum, who had had large experience in oil matters, met Professor Owen in Bakersfield in 1903. Owen stated to him that he thought *the whole country from 30-22 clear to the lake was oil territory, as he had examined it carefully*. The lake referred to is the Buena Vista lake situated in township 31 South, range 25 East. He testified that that would include townships 30-22, 30-23, and 30-24 and that it was in the Spring of the year 1903, he thought, when Owen told him this (R. 508).

On cross-examination Farnum testified as follows:

“I met Mr. Owen in Bakersfield in 1903. We discussed the general trend of the Elk Hills. I asked him whether he thought we would likely get oil and he said ‘Yes’—I don’t know his exact language. He said something about the depth we would have to go, but I can’t say what it was now. I am not sure whether he said it was three or four thousand feet. I think he said it would be deep. I thought myself it would be at least two thousand feet, but Mr. Youle always contended it was shallow territory by reason of the uplift. The hill, he said, made an uplift; it was not caused by erosion, but by an elevation from below.” (R. 521.)

Now, it is true that appellants’ chief expert witness, F. M. Anderson, testified that in March, 1903, he and Owen stood on a hill north of the Temblor valley, where they had a very good view-point of all the surrounding regions towards the valley and along the flank of the Temblor Range, and had a conversation in which Owen told him that he had been there about a month and had visited about all parts of the valley contiguous to McKittrick. Owen told him what he had seen over in the Elk Hills and told him that it looked to him like an anticline running through these hills from northwest to southeast, but that there was no outcrop on the surface from which he could learn anything. Anderson asked Owen if it looked anything like oil land over there and Owen, he claims, said that he had seen nothing that looked like oil and that he did not think it was an oil district or that it was oil land. Anderson remarked that it appeared to him that the Elk Hills were “a



long ways out" from the foothills of the Tumbler Range where the oil was likely to be and that Owen said "yes, it appeared that way to him"; that was about as much as Anderson recalled of the conversation (R. 2381-23). The foregoing evidence of Anderson is relied upon by appellants to contradict the testimony of witnesses whose evidence has been stated above. Anderson was a vitally interested witness for appellants, while the witnesses whose testimony is given above had no interest in the result of this litigation. Furthermore, their testimony is consistent with Owen's written declarations found in the letters above quoted from, while the views attributed to him by Anderson are contradictory thereof. In addition, that the belief attributed to Owen by Wagy, Ott, Wible, Haberkern, Brisco and Farnum was Owen's actual opinion appears from certain locations in the Elk Hills in which he was interested; and his effort to secure for their mineral value lands lying there is not consistent with the views attributed to him by Mr. Anderson.

As already stated, in August or September, 1904, C. F. Haberkern took Professor Owen to the outcrop in section 32 of 30-24. In pursuance of the examination thereof made by Owen and himself, he and his associates located lands in township 30-23. They located only the even-numbered sections for the reason that Owen said that he was working for the railroad company and told Haberkern not to take any railroad land. By railroad lands he understood that Owen meant the odd-numbered sections

of 30-23. That township was not surveyed in 1901. Afterwards the Eight Oil Company was organized. Owen told Haberkern that he wanted to get some stock in that company for William Hunt and Prof. Dumble and arrangements to that end were perfected. The statement which Owen made to him about keeping off the odd-numbered sections in 30-23 was made in August or September, 1904 (R. 350-1). The first location he made in township 30-23 was made in 1907. He had been there about a dozen times with Owen and in 1907 he followed Owen's suggestion about not locating anything except even-numbered sections (R. 351). Perhaps a month before Haberkern and his associates made their locations in 1907 they talked the matter over with Owen and Owen told them to locate on the even-numbered sections in 30-23. He knew that it was in August or September, 1904, that he showed Owen the railroad land in the Elk Hills where the mineral was and said: "How about locating those?"; and Owen said "No." (R. 352.) He was positive that it was in 1904 and not in 1907 that Owen told him that he was working for the railroad company and that it would not look good for him to locate the odd-numbered sections in 30-23 (R. 354-5).

The Eight Oil Company was organized in April, 1909, and at the time of its organization Josiah Owen had eight thousand shares of its capital stock (R. 347). The other stockholders were T. E. Klipstein, H. T. Tupman, E. W. McCutcheon, W. E. Richardson, Charles Haberkern and his wife. When this com-

pany was organized, it had even-numbered sections in township 30-24 and some of the people that were interested in it had some lands in 30-23 (R. 323). Professor Owen furnished information of the geologic character of the holdings of the Eight Oil Company to that company.

Captain W. H. McKittrick in 1899 made an investment in some mining property in Mexico on the advice of Josiah Owen which did not turn out very well and Owen constantly apologized for making a bad investment for him. The witness met Owen on an Oakland boat in 1903 or 1904, when Owen said to him: "I am awfully sorry about our investment down there, but I have something that I will put you onto that will make you more money than the mine we might have had in old Mexico." The witness asked Owen what it was and Owen replied that he was not at liberty to tell him then, but would tell him when the proper time came. In 1907 the witness met Owen in Bakersfield and Owen told him that he was then ready to put him onto what they were talking about in 1903. *Owen told him that he had been working out in the Elk Hills for a number of years and that no one knew that he had been out there at all and that the witness should say nothing about his being out there; that he had been out there in the employ of the Southern Pacific Railroad and had located large deposits of fuller's-earth. Owen stated that he would name four men and that the witness could name four and that they would go out there and take as many sec-*

tions as they cared for, as they would all be open on the first of January, 1909. *Owen said at that time that there was a possibility of oil there, but that oil could not be found under 3400 feet.* Owen told the witness on several occasions that Professor Dumble was his partner in any venture that he might make (R. 527-8). Owen told him that he knew in 1903 that there were thousands of tons of fuller's-earth in the Elk Hills; *that there might be a possibility of oil there, but that it would not be found within less than 3400 feet and that he could not tell whether it was in paying quantities or not, but that he believed that oil was there at that depth* (R. 535). The lands were located in 1909—sections 20, 22, 24, 26 and 28 of 30-23 (R. 536). The witness thought that they had developed fuller's earth on all of the sections mentioned, but that they didn't sell any of it. They applied for patent on the basis of their fuller's-earth discoveries and their applications were contested by certain persons backed by the Associated Oil Company who contended that the land was oil land and at the time of trial patents had not issued (R. 536-7).

The foregoing evidence of Captain McKittrick shows clearly that as early as 1903 Professor Owen thought that there was oil in the Elk Hills. It is true that he thought that it lay deep; but it nowhere appears that he thought that its probable depth was prohibitive. The fact that none of the alleged fuller's earth was ever sold shows that it was not of commercial quality and sheds a flood of



light upon the view of Josiah Owen that this enterprise would more than compensate Captain McKittrick for his losses in Mexico. The true significance of the situation lies in the fact that, if patents could have been secured by reason of these surface discoveries of fuller's-earth, the oil that lay at depth in the land would have become the property of the patentees. It required large outlays of money in those days to drill wells and a single discovery made possible a patent to an area not greater than 160 acres. Thus, to have secured patents to several sections in the Elk Hills because of discoveries of oil would have necessitated a very large expenditure of money, while a mere pittance might, if the scheme had been successful, have enabled the interested parties to secure patents based upon surface discoveries of fuller's earth. The only possible construction to be placed upon this situation is that Owen thought that, by claiming the lands on account of the discovery of fuller's-earth, he and his associates could secure patents to them and thereafter develop or lease or sell them for their value as oil lands. This view of the matter explains the secrecy of his movements and of the enterprise—the secrecy with which he made his investigation and the secrecy which he enjoined upon Captain McKittrick. If Owen's faith had been in the "thousands of tons of fuller's earth", there would have been no point to his idea that secrecy was the part of wisdom and expedience.

It is respectfully submitted that the testimony

recited conclusively establishes Josiah Owen's belief in 1904 in the oil character of the lands in suit.

**C. W. Eberlein's belief:**

Much will be said of the testimony of this official of the Southern Pacific Railroad Company in connection with the discussion of the subject of fraud. It suffices at this time to say that he was the acting land agent of the Southern Pacific Railroad Company who signed the application to select the lands in suit and filed list 89 accompanied by an affidavit that the lands in suit were non-mineral lands of the character contemplated by the grant. It is true that, when testifying as a witness for the government, Eberlein stated that he did not at the time of filing the selection list suspect the oil character of the lands in suit. However, there are just two things to contradict this statement.

After the original selection list No. 89 had been filed by Eberlein and had been rejected by the Register and Receiver because of the outstanding suspension of February 28, 1900, already herein at some length discussed, Eberlein wrote a letter to D. A. Chambers, the Washington, D. C., attorney of appellants, concerning the matter of an appeal from the decision of the Register and Receiver to the Commissioner of the General Land Office. That letter is set out in full on 1577-1580 of the record. After discussing the matter of procedure with reference to the appeal and the wise course to follow

to the end that the patenting of the lands in suit might be expedited, Eberlein writes:

"I am particularly anxious in regard to this list as *the lands adjoin the oil territory* and Mr. Kruttschnitt is very solicitous in regard to it." (Italics supplied.)

Eberlein testified that he had recently taken charge of land matters for the railroad company in California and that he knew little or nothing concerning these lands; but one thing with reference to the state of his knowledge is perfectly plain and that is that he knew that "*the lands adjoin the oil territory*" and realized the significance of that fact.

The other circumstance reflecting light upon Eberlein's thought concerning the lands in suit is his unwillingness that the geologists of the Southern Pacific Company should examine unpatented land, that unwillingness being based upon his apprehension that they might discover things which would charge the applicant railroad company with notice of the mineral character of the lands to which it was endeavoring to secure agricultural patents. And what were those things which expert oil geologists could and inevitably would discover in making an examination of lands "adjoining the oil territory"—lands on the apex of a "dome" considered the most favorable structure for the accumulation of oil? It will be remembered that the regulations made by the Secretary of the Interior required that each selection list be accompanied by the affidavit of the land agent of the applicant railroad to the effect

that the lands applied for were non-mineral agricultural lands and of the character contemplated by the grant of 1866. As heretofore pointed out, *this imposed upon Eberlein the duty of so informing himself as to be able to speak the truth.* The requirement in question went further than as just indicated and made it obligatory upon him to make oath that he had caused the lands applied for to be examined as to their mineral or non-mineral character by employees of the applicant company. Notwithstanding this Eberlein insisted that an embargo be placed upon the examination of unpatented granted lands of the railroad by geologists of the Southern Pacific Company, who have been shown to have been Professors Dumble, Owen and Anderson, for fear that they might discover and disclose that these lands, instead of being agricultural, were mineral in character. And so Eberlein protested to his chief in New York, Judge W. D. Cornish, Vice-President of the Southern Pacific Company and an officer of the Southern Pacific Railroad Company as well, against the practice of Mr. Dumble and his men of examining lands not yet patented to the railroad company. He stated that he protested and protested vigorously and also had talks with Mr. Markham, General Manager of the Southern Pacific Company, about the matter, pointing out to him that "people acting without any kind of knowledge of what they were doing, without any reference to the selection list of the company, without any reference that even the lands were patented or even surveyed—that it was charging the company with



notice, that it didn't charge him with notice, but it certainly would be the ground on which to get in and protest the patents or protest the lists—and so the fact turned out to be" (R. 1090-1-2-3).

Eberlein's protests culminated in 1908 in an order made by the New York Office forbidding the giving out of printed lists of lands and the examination of unpatented lands by oil experts. Subsequently, it was provided that Dumble and his men should not be furnished with any data whatever except as to patented land, for the reason that such information would be embarrassing to them and to the company and might make them witnesses against the company in mineral contests.

This is the substance of the letter written February 22, 1908, from New York by Eberlein to his chief clerk, Conlin. The letter was written under the authority of Judge Cornish who had charge of the land affairs of the Southern Pacific Railroad Company (R. 1094-5-6). Eberlein testified that the statement in this letter—"the examination of our S. P. lands not yet patented by our oil experts must be stopped, *as information that they may obtain or give as to the mineral character prior to patent will forever prevent our getting patents*"—was a continuation by him of the accustomed protesting which had started as soon as the Kern Trading and Oil Company lease had been offered to him for execution in 1904 (R. 1097-8).

Another side-light is thrown upon Eberlein's thought concerning the lands in suit in a letter written by him to Judge Cornish September 3, 1904, in which he used this language:

“We have selected a large body of lands interspersed with the lands sought to be conveyed by this lease and which we have represented as non-mineral in character”; and “should the existence of this lease become known it would go a long way toward establishing the mineral character of the lands referred to and which are still unpatented.”

*Eberlein testified that that lease put him on inquiry as to why the lands included in it were to be conveyed to the Kern Trading and Oil Company, an oil development company, when they were supposedly non-mineral lands (R. 1090); and he said “I felt and I knew certainly it would work against the company” (R. 1091).*

Enough has been said to show that Eberlein, the acting land agent, whatever may have been the state of his actual knowledge concerning the lands in suit, suspected in 1903 and with good reason that they were oil lands; and, if he did not admit belief in their oil character, it was for the reason that to have done so would have stultified him and convicted him of a serious dereliction of duty; for, while he might still have taken the position that at the time of making the first non-mineral affidavit he really knew little or nothing about the lands selected, yet, in the light of what he learned

afterwards and in view of the fears which he expressed and the protests which he made, it is not conceivable that he did not suspect and, indeed, believe in the oil character of the lands which he was assisting his employer to secure under an agricultural grant.

**George A. Stone's belief:**

At the time of testifying as a witness for the government George A. Stone was a pensioner of the Southern Pacific Company. He was in the employ of the Southern Pacific Company from 1865 to the latter part of 1907. During the last years of his employment he was clerical assistant to the acting land agent, C. W. Eberlein, and under his direction prepared in 1903 selection list number 89. He was acquainted with township 30-23, but made no examination of the lands in suit for the purpose of selecting them, such knowledge as he had being general in character from his general knowledge of the country (R. 1028-9). As already indicated in connection with the belief of Professor Dumble, Mr. Stone thought that Dumble pressed the selection of the lands in suit because he thought that they were oil lands. At the end of December, 1907, Stone was discharged from the service of the Southern Pacific Company by Eberlein.

January 8, 1908, Stone wrote a letter to E. E. Calvin, General Manager of the Southern Pacific Company, in which he referred to his dismissal by Eberlein and expressed the hope that Mr. Calvin,

in fairness to him and for the best interests of the company, would carefully investigate the matter and arrange for a transfer to some other employment (R. 3118). He sent a copy of this letter to Mr. Kruttschnitt on the same day. His letter to Mr. Kruttschnitt is plaintiff's Exhibit 5-N and is as follows:

"Dear Sir:

I enclose herewith copy of letter mailed to-day to Mr. Calvin asking for transfer from Land Dept., to other service. As land examiner and asst. land agent I have obtained a knowledge of the lands and records not possessed by any other official or employee of the company, but notwithstanding this, and though I have for several years borne a large part of the burden, Eberlein has seen fit to force me out. I think the quality of my work and the confidential character of my employment in land department indicate that the best interests of the company will be served by not turning me down after long and faithful service. Mr. John D. Isaacs has known me for many years.

"Yours respectfully,

"Geo. A. Stone,

"169 Tenth Street,

"Oakland, California."

(R. 3117-18).

Having received no favorable reply to the letters above mentioned, Stone on March 23, 1908, wrote Mr. Kruttschnitt another letter in which he reviewed his dismissal and former letters with reference thereto and wrote as follows:

"I served the company faithfully and well many years and hoped that its interests would always be mine, but if a hearing and fair treatment are not accorded me without further delay



my services will be at the disposal of the newspaper press, the United States Attorney General and others." (R. 3116).

Subsequently Stone was placed on the Southern Pacific Company's pension list and he was its pensioner while testifying as a witness for the government. When subpoenaed as a witness he went of his own accord and informed Mr. Singer, of the law department of appellants, of that fact and on the very morning on which he was sworn as a witness he had told counsel of record for appellants in this case that selection list 89 was made up at the suggestion of Professor Dumble. Whatever the state of Stone's knowledge or ignorance of the lands in suit may have been, it is obvious that the conclusion which he drew from what he knew concerning their selection was that they were mineral lands and were coveted by appellants as such.

**D. Burkhalter's belief:**

D. Burkhalter in 1899, 1900 and subsequently was Division Superintendent of the Southern Pacific Company with headquarters at Bakersfield (R. 3429). He did not testify as a witness in this case and consequently there is no record of any expression in words of his belief concerning the character of the lands in suit; but there is an expression in his acts. December 13, 1899, together with others he made four attempted locations covering the several quarters of section 33 of township 30-24 (R. 3427-8-9). Thus, in 1902 the Southern Pacific Railroad Company obtained an agricultural

patent to a section of land which in December, 1899, one of its division superintendents had attempted to locate under the placer mining laws as oil land. Comment seems hardly necessary. Burkhalter's belief is obvious.

**Julius Kruttschnitt's belief:**

As a witness for appellants Mr. Julius Kruttschnitt, former General Manager and at the time of testifying Chairman of the Executive Committee of the Board of Directors of the Southern Pacific Company, was most loud in his protestations of ignorance of the character of the lands in suit at the time of their selection in 1903 and at the time when the patent thereto was obtained in 1904. The active and responsible head of a gigantic railroad system would not be expected to remember nine years after they had happened all of the details of transactions which had come under his notice. A contemporaneous record of what a man thinks is far more reliable than his memory of what he thought or believed. Without ascribing to Mr. Kruttschnitt any desire to tell other than the whole truth, it is perfectly fair to hold that those who came in contact with him *rebus gestibus* and reduced to writing their knowledge of his state of mind were in a more favorable position to give a fair version of what he thought and stated than he could possibly have been nine years after the event; and so attention is invited to the statement of C. W. Eberlein in his letter of December 10, 1903, to D. A. Chambers, Washington attorney of appellants. In

that letter, writing with reference to his efforts to secure patent to the lands in suit and referring to section list No. 89, he says:

"I am particularly anxious in regard to this list as the lands adjoin the oil territory and *Mr. Kruttschnitt is very solicitous in regard to it.*" (Italics supplied.)

There is something peculiarly suggestive in the connection between Mr. Kruttschnitt's solicitude and the fact that the "lands adjoin the oil territory". This declaration or statement of Eberlein was made contemporaneously with the main event, to wit, the effort to secure patent to the lands in suit. How Eberlein could have arrived at a conclusion with reference to Mr. Kruttschnitt's attitude towards the matter, unless he had heard some expression from him, it is difficult to conceive. It has already been shown that Professor Dumble as a witness for appellants claimed that the letter which he wrote to Mr. Baneroft suggesting that the lease to the Kern Trading and Oil Company be held up until "that danger was passed" was prompted solely by a desire to accommodate and appease Mr. Eberlein. Mr. Kruttschnitt in his testimony places himself on similar ground and states that a certain telegram which he sent to Mr. Chambers was transmitted solely for the purpose of helping Eberlein along. There should be little wonder then that Eberlein, when testifying as a witness, contended that others tried to get from under and "pass the buck" to him. It is manifest that there is an intimate connection

between Mr. Kruttschnitt's "solicitude" and the fact that "the lands adjoin the oil territory."

**F. M. Anderson's belief:**

F. M. Anderson was a geologist in the employ of appellants in 1903 and one of their expert witnesses at the trial. He was most positive in testifying that the Elk Hills were not oil territory, his statement being that he did not believe the sands of the Etchegoin shoreline could have been carried to the position of the Elk Hills and, if they ever were or any part of them ever reached there, they would exist in very thin strata only sufficient in thickness to allow a flow of oil in its progress of migration elsewhere; but he never expected to find in the Elk Hills any considerable thickness of sand in the position of Etchegoin or any other for the reason that they were in their geological position so far away from the source of sand and material. This idea was expressed elsewhere by saying that the Elk Hills were too far away from the outcrop to fill (R. 2455-6). He stated that the Elk Hills were "a long ways out" in the interior basin—from six to fourteen miles from the outcrop of the oil-bearing source (R. 2441). Notwithstanding his opinion that distance from the outcrop was controlling and therefore eliminated the Elk Hills from the category of oil-bearing lands, he collaborated with Dumble and Owen in the determination in 1903 of the lands to be included in the lease to the Kern Trading and Oil Company for oil development purposes (R. 2406) and recommended the inclusion



in that lease of section 31 of 30-23, a section in the very township in which the lands in suit lie and as distant from the outcrop as they (R. 2415). Reference to the last cited page of the record will show that Mr. Anderson first very boastfully testified that he had never recommended to Professor Dumble or to anybody the inclusion of any land in township 30-23. Then, when the suggestion came from counsel for appellants, who knew better than Anderson what Anderson had done, that he had recommended the inclusion in that lease of section 31 of 30-23, a section in the very township in which the lands in suit lie and as distant from the outcrop as they (R. 2415), Anderson proceeded to modify his former positive statement.

That which is of interest and concern here is not what Anderson testified to and thought in 1912, but his opinion or belief in 1903 and 1904. Asked by counsel for appellants as to his own individual opinion in 1903 and 1904 as the result of the work and examination which he had made in that territory as to the Elk Hills being oil lands, he replied:

"My conclusion as to the likelihood of the Elk Hills being then or ever being oil territory was negative. That is to say, that I did not believe they were oil-bearing or ever would be found to be oil-bearing, at least not in paying quantities, not commercially oil-bearing. *I suppose that I did expect there might be insignificant deposits of oil found in there*, as there might be in any part of the country between Sunset and Coalinga if there was a well put down in those beds." (R. 2454.)

This is a concession from the expert who testified that "it obviously is impossible for any geologist to look into the ground below the surface very far. He might infer various things and come to some kind of conclusion, but he certainly cannot reach a sound conclusion that a given piece of land will be oil producing without actually drilling it"; and that drilling "will not be sufficient to determine the problem of its commercial value. Its commercial value cannot be determined by drilling alone, but, in the event that oil is reached, the well will have to be put on the pump and pumped for a definite number of months or for a definite period of time in order to prove satisfactorily its productive capacity. The final and ultimate test of the value of oil lands is the actual production over a period sufficient to recover all costs and pay interest on the costs and to pay a proper dividend above all the costs and above all the interest." (R. 2548-9). It thus appears that in 1903 Mr. Anderson reached a conclusion upon geological evidence alone that the Elk Hills probably contained oil, but not in commercial quantities; so that at that time he was determining without the drill what in 1912 he said could be determined only with the drill and sustained production.

From what has been said with reference to the testimony of Mr. Anderson it seems clear that in 1903 and 1904, during the time of the proceedings which resulted in the patent now assailed, he entertained the belief that the Elk Hills contained oil. To be sure, he says that he doubted whether the oil

was present in commercial quantities, though expressly contending that that fact is capable of determination only by the drill and subsequent sustained production. If the Elk Hills contained oil in the quantity in which Anderson believed that it existed there, if one had drilled a well and had encountered it, he obviously could have secured from the government a patent to the land under the placer mining act. If this be true—and it is necessarily true—, then the lands in suit were not such as were subject to selection by the railroad as non-mineral agricultural land. That is to say, the granting act plainly excluded lands both within the primary and indemnity limits which were subject to acquisition under the mineral land laws.

*The necessary conclusion from the testimony of Mr. Anderson, read in the light of the pertinent laws of the United States, is that in 1903 and 1904 he believed the Elk Hills, including the lands in suit, to be territory subject to acquisition under the mineral land laws of the United States and consequently not subject to selection by the railroad as non-mineral agricultural lands.*

**Belief of Appellants as evidenced by reservations of land and withdrawals of land from sale:**

This subject has already been covered and it has been shown that in 1899 J. B. Treadwell, oil expert of appellants, withdrew large areas of land from sale as agricultural land so that they might be

developed for the production of oil; and that these withdrawals included lands several miles further from the outcrop than the farthest lands in suit and that the lands in suit themselves would have been included in these withdrawals, if they had then been patented. Mr. Kruttschnitt himself threw considerable light upon the policy of appellants in this regard and the following extracts from his testimony are informing:

“Referring particularly to the lands which are involved in this suit, the first information I now recollect ever having received concerning that land or any land in the vicinity was in 1903. Mr. Harriman had instructed me to push the use of oil fuel on our locomotives. I had done a little in this direction during Mr. Huntington’s life and Mr. Harriman was much impressed with the economies that might be effected in this way.

“Under these conditions one of the first things to be done was to ascertain what lands the company had which were available for oil production. Mr. Treadwell, after the excitement resulting from the finding of oil in Southern California, had recommended for reservation from sale nearly all of the indemnity lands in Southern California. It was evidence to me that this reservation was entirely too broad. It took the company’s lands entirely off the market, so when Mr. Dumble was put in charge of this work, *one of the first things I told him to do was to review these reservations of lands from sale and to make up a list of those lands the department should not be permitted to sell* (R. 3082).

“I instructed Mr. Dumble to make this examination some time in 1903. The examination



was made and maps showing the results were sent to me in the autumn of 1903. \* \* \*

"In 1903, Mr. E. T. Dumble was under my direction and control and I may say in a general way he has been under my direction the entire time he has been with the company. But in 1903 he was under my immediate direction as I was the executive officer in control of the oil production of the company during that time (R. 3083-4).

"The Kern Trading & Oil Company was formed for the purpose of developing oil on lands owned by the railroad company and also for the purpose of collecting royalty oil on some lands that at that time had been leased to outsiders. In addition to this it was to purchase oil for the operation of the railroad. I do not know at whose suggestion the company was incorporated. It was really organized *as a fuel oil development* and purchasing department of the Southern Pacific Company (R. 3084).

"As I have said, I was put in charge of the development of oil. To facilitate this development the Kern Trading & Oil Company was incorporated in the early part of 1903. One of the first questions considered was what land this company should begin operating on and also what land should be reserved from sale. I wanted all such lands turned over to this company so as to have control over them and prevent their sale. We had had trouble some years before as the land department had sold extremely valuable oil lands. I did not want that repeated and I wanted the lands placed under the control of Mr. Dumble so as to be positive that they could not be sold. This led to my telling him, I think in June, 1903, to have an examination made of lands owned by

the company, so that we could take them off the market and, as far as their sale and development was concerned, take them out of the control of the land department.

“It was my purpose to have all lands that were considered to be either actual oil lands, probable oil lands or possible oil lands, turned over to the Kern Trading & Oil Company so that it could control them.” (R. 3085.)

From the foregoing it appears that the policy of withdrawing lands from sale was begun during the regime of Treadwell and was renewed and continued after Dumble succeeded him. From all of which it appears that Treadwell, Dumble and Owen regarded as oil lands sections further removed from proven oil territory than the lands in suit, thereby showing that in 1903 and in 1904 appellants' own geologists were by their acts agreeing with the method outlined by the government experts, Dr. Branner and Mr. Veatch, for determining in advance of development whether given lands are oil lands or not. It will be noted, too, that, while Mr. Kruttschnitt thought Treadwell's reservations “entirely too broad”, he and Dumble and Owen did not think that the withdrawn or reserved lands in the Elk Hills were a part of the excessive breadth, because, when Mr. Kruttschnitt told Dumble to “review these reservations” of Treadwell, Dumble and Owen did so, but did not take the Elk Hills land out of the reservations.

**Belief of Appellants as evidenced by the construction of the railroad from Bakersfield to McKittrick:**

It is not necessary to argue at length concerning this matter. The testimony of H. A. Blodgett, a disinterested witness, demonstrates that this road was built for the purpose of tapping the oil fields and securing the vast tonnage which their development would produce. The following extracts from his testimony are in point:

"I remember when the Southern Pacific Railroad Company was put into McKittrick. I had something to do with the proposition of putting it in there. The inducement that promoted the construction of the road was the prospect of a profitable traffic that was to come out of the production of asphalt and oil in that district. I think the road was put into McKittrick in 1893. At that time I was operating an asphaltum business in the vicinity of McKittrick. I interested the Southern Pacific Railroad Company people through Henry F. Williams, who was at that time residing in San Francisco but spent much time in Kern and who was selling town lots in Kern for the Pacific Improvement Company. I knew Mr. Williams to be on very close and cordial terms with the railroad people and that is why I went to him. I took the matter up with the railroad authorities, particularly Mr. A. N. Towne, the general manager. I had a number of interviews with Mr. Towne and visited him several times at San Francisco. I helped to organize the Standard Asphalt Company. I would say that the Standard Asphalt Company was one of the subsidiaries of the Southern Pacific Railroad Company as it was organized to acquire property that was to be conveyed in consideration of the building of that railroad. The first officers and directors

of the Standard Asphalt Company, I think, were Mr. Towne, Mr. Dowtey, Mr. Williams, Mr. Jewett and myself, I think. One half of the stock was held by the directors of the Pacific Improvement Company. One half of the stock of the Standard Asphalt Company was owned by Mr. Jewett and myself and the other half by the Pacific Improvement Company representing the Southern Pacific Railroad Company. The railroad was put there in pursuance of these arrangements about the organization of the Standard Asphalt Company in the transferring of the stock and has been operated ever since. The right of way from Bakersfield to McKittrick was obtained by Mr. H. Williams and me. It was largely donated. There were a number of odd numbered sections which had been patented to the Southern Pacific Railroad Company crossed by this road from Bakersfield to McKittrick and I do not think any right was specifically obtained. The railroad owned the sections and there was no necessity for giving them what they already had. The interests of Jewett and Blodgett were transferred to the Standard Asphalt Company in accordance with the agreement for the building of this railroad. At that time Jewett and Blodgett had some leases of oil lands in the McKittrick field and some lands in fee in the Sunset field, all of which were conveyed to the Standard Asphalt Company pursuant to the arrangement. At that time we had extensive lease-hold interests at McKittrick and also a great deal of land in Sunset. At that time we had shipped several hundred tons of asphalt. Prior to that time it was a paying business. We had to transport a long distance by team from Sunset and McKittrick to Bakersfield and it was very expensive but we had delivered a good deal of asphalt and we were satisfied that it would be a paying business and would justify



the construction of a railroad which would furnish transportation. The future probabilities of that district or the country tributary to the Southern Pacific branch into McKittrick as an oil producing and oil shipping community figured largely in the inducements which lead to the putting of the road in there at that time. The portion of the road from Lokern to McKittrick was built to furnish transportation for the production of oil and asphalt from that McKittrick field. The probabilities of a great production of oil and shipment of oil in the future from that district was understood by the railroad officials as an inducement to get them to build a road through there as I had personally brought that matter to Mr. Towne's attention. I told Mr. Towne that the deposits of asphaltum in evidence in that district was a drop in the bucket only to the quantity of oil that was tanked underneath and that would be produced. In other words, the visible evidence of tonnage was as nothing, practically, compared to what was underneath." (R. 363-4-5.)

The testimony of Mr. Blodgett is thoroughly corroborated by that of W. E. Youle and John R. Scupham; and while William Hood, the engineer of appellants who superintended the construction of this road, stated that it was constructed from Bakersfield to Lokern primarily to develop the agricultural business and particularly that of Miller and Lux and that the continuation of the road from Lokern to McKittrick was for the purpose of tapping the asphaltum deposits and that, as far as he knew, there was no idea of oil development at that time, he showed very plainly that his acquaintance was with the actual facts of construction rather

than with the purposes or ends which it was intended to subserve.

The suggestion that this road was built because of the opportunities offered by the agricultural development of the country through which it ran is, to say the least, naive in view of the fact that the region, as heretofore shown, was a semi-arid desert in which practically the only enterprize at that time was the operations of Miller & Lux in cattle raising.

Of course, it is not asserted that the construction of this road evidences the belief of appellants in the oil possibilities of any particular or specific part of what has since been developed as the oil territory of the great Midway region, but that it is convincing proof of the belief of the enterprising men who were at the head of the affairs of the Southern Pacific Company in the future development of the region as an oil producing tributary to the railroad. If the country was not good for oil, it was good for nothing. Colonel C. F. Crocker, a director of the Southern Pacific Company and one of the master minds of that great corporation, remarked to Mr. Scupham, when the latter expressed the opinion that "those hills south of Miller & Lux' ranch are overlying an oil deposit", as follows: "Well, it is a good thing that there is some value of that kind in that land, otherwise it would be a very poor asset for the company." (R. 588.)

Belief as shown by mineral locations:

In the volume of "Documents and Evidence Not Printed" there is a memorandum abstract of notices of location of mining claims recorded in the office of the County Recorder of Kern County, California, covering the period from 1899 to 1906 and affecting or relating to sections in township 30-23. This memorandum begins at page 600 and extends to the end of the volume on page 786. No digest of these locations will be here attempted. The attention of the Court is merely invited to their number, their continuity and the names and character of the large number of the persons who participated in filing them. It was suggested below by counsel for appellants that these notices meant nothing and involved nothing for the assigned reason that they were merely the result of the excitement attendant upon the discovery of oil in the Kern River field in 1899 and were made by people who knew nothing of the characteristics of oil land or lacked that acquaintance with surface indications and structural relationship necessary to the proper determination of the oil character of land. In answer to this suggestion it seems only necessary to point out the identity and qualifications of a large number of men who participated in filing these notices, the record cited showing that a great number of the locations were repeated year after year. Among those who filed the notices in question are:

S. G. Drouilliard, who had mined and prospected thirty years and was engaged in the oil business from

1899 to 1904 and was intimately acquainted with the Midway and McKittrick regions (R. 114);

C. W. Lamont, who had mined and prospected since 1879 (R. 580);

M. S. Wagy, who since 1898 had been developing oil in the Kern River field and at McKittrick and Temblor (R. 176);

H. A. Blodgett, who was a pioneer in the Sunset, McKittrick and Midway fields and was at the time in question the largest operator in that region, having been engaged in the oil business for twenty-three years at the time when he testified (R. 360);

J. I. Wagy, who had been in Kern County since November, 1893 (R. 237);

N. C. Farnum, whose principal business for many years had been connected with oil lands in Kern County (R. 493);

W. E. Youle, so often referred to as the principal oil expert in the McKittrick region and whose long history of connection with the development of oil lands is set out in the record at pages 540-1-2-3-4;

S. Jewett, the senior member of the firm of Jewett & Blodgett, the principal operators in the McKittrick and Midway country at the time in question;

A. T. Lightner, appellants' witness, who at the



time of testifying thought nothing good of the Elk Hills, but in 1903 was joining with others in locating lands therein for oil purposes (R. 1977).

Timonthy Spellacy, who was mentioned by appellants' witness E. J. Miley as having said that the "fellows in the flat were playing pretty much of a sucker game" (R. 1723); but who had on September 16, 1903, located sections 14, 15 and 16 and in 1905 liked the Elk Hills so well and had such faith in their oil character that he went out and re-located section 16 and actually located section 27, one of the sections here in suit, on February 12, 1903;

H. W. Thomas, another of appellants' witnesses, who testified to his long connection with and intimate knowledge of oil lands and oil development (R. 1828);

Charles A. Brisco, who went to McKittrick in 1897 and knew all about the country, having been a driller and prospector (R. 335);

H. P. Doyer, who was interested in oil locations in the Midway and in the Elk Hills (R. 463);

C. H. Allison, another of appellants' witnesses, who stated that he was familiar with all of the oil development that had been carried on in the west side fields (R. 1999);

D. B. Hoy, who was interested with F. D. Lowe in drilling in 1900 the well on section 11 of 31-24 in

the Elk Hills in which gas was encountered at 500 feet and a small showing of oil (R. 146-7);

C. H. Meves, another of appellants' witnesses, who was agent for the Southern Pacific Railroad Company at Buttonwillow near the Elk Hills from 1893 to 1905 (R. 2003);

C. A. Barlow, maker of the Barlow & Hill maps, a member of Congress, engaged in the oil business and mining business and a witness for appellants (R. 2006);

W. H. Hill, the other member of the firm of Barlow & Hill, map makers, who knew all about the oil conditions in the region in question (R. 109);

W. G. Sylvester, who made examinations of the surface indications and whose party ran a foot race with Jeff Packard and his party to see which side would get in first (R. 356);

D. Burkhalter, division superintendent of the Southern Pacific Company at Bakersfield (R. 3429);

John Jean, who located on the strength of the advice of J. B. Treadwell and L. G. Sarnow (R. 128);

L. G. Sarnow, who was employed by the Southern Pacific Railroad Company and had charge of its drilling and operations in the McKittrick field and who had had large experience in oil matters (R. 133);

F. J. Sarnow, a brother of L. G. Sarnow and himself an experienced oil man (R. 164);

And last, but not least, J. B. Treadwell, appellants' oil expert and in charge of all of its oil development and operations in 1899 and several succeeding years, already many times herein referred to.

The wide experience in oil matters of the persons above mentioned affords most emphatic answer to the contention of appellants that the locations in the Elk Hills were made only by "tenderfeet" and men who by reason of the excitement caused by the discovery of oil in the Kern River field in 1899 were attempting to secure lands for oil purposes wherever they might be situated and whatever their condition. The memorandum of these locations covers 185 pages and the names of Drouillard, Blodgett, Youle, Jewett and Spellacy and others of the most prominent oil men in the California fields appear not once nor twice, but many times, showing that they located many quarter sections and re-located them for a period of several years. E. J. Miley, one of appellants' witnesses most relied upon and who was most unsparing in his condemnation of the Elk Hills, is the gentleman to whom the witness L. D. Bell referred when he stated that he "heard that Miley was located all over the Elk Hills" (R. 1805); and Bell was a witness for appellants (R. 1802).

Appellants say that the fact that, with the exception of the Lowe well on section 11 of township 31-24 which encountered gas and a small amount of

oil at a depth of 560 feet, there was no development in the Elk Hills proves that many mineral locations made there were not *bona fide*. The answer to this contention is that the record shows that the failure to develop the locations between the period from 1899 to 1904, when the patent was issued, was due to four causes:

1. The suspension of the lands from all forms of acquisition by the governmental order of February 28, 1900, of which somewhat has already been said in this brief;
2. The low price of oil;
3. The lack of transportation facilities; and
4. Lack of funds on the part of the locators.

H. A. Blodgett was certainly not biased in behalf of the government. As already indicated, he was the most prominent and experienced oil man around McKittrick in 1900. He had large interests in the region round about. He promoted the building of the railroad from Bakersfield to McKittrick and made a gift of the right of way. He it was who brought W. E. Youle into the field, the most experienced oil expert of that day, who did more for the development of the oil resources of the San Joaquin valley than any other man. Mr. Blodgett testified that there was a considerable oil boom in Kern County in 1899 and 1900 which kept up for three years or more and was shared in by geologists and competent men of experience in oil matters; but that the low price of oil made it unprofitable to produce oil under any circumstances and that that



fact was the reason for the end of the excitement, the lack of cars for transportation having also considerable to do with it, the two factors, the low price of oil and lack of transportation facilities, making the marketing of oil practically prohibitive. Oil could not be produced profitably and investors lost interest. That condition paralyzed the region and development ceased. The Associated Oil Company was the only concern that could secure transportation and it was furnishing oil to the Southern Pacific Company (R. 366, 370).

Formerly the Southern Pacific Railroad Company bought oil from all producers in all of the fields in Kern County, but later only from the Associated Oil Company (R. 370). The oil boom which began in 1900 ended in the summer of 1902 (R. 383). Many competent oil men came in during the excitement (R. 384). It was his intention to develop from locations in the Elk Hills, but during the period from 1902 to 1905 or 1906 the conditions of the oil business were such that it would have been ridiculous to spend any money. He retained possession, but did no development work (R. 389). His reasons for not developing the property in the Elk Hills was that there was no market for oil. The following are his own words:

"The price was so low that, if you had had a thousand barrels a day in the Elk Hills, you could not have transported it—it wouldn't be worth a cent." (R. 390.)

The reason he did no drilling in the Elk Hills was

that oil had no value (R. 391). "The only development we did was right alongside of the railroad track. That would give it a little more value—not much—than if it was in the Elk Hills, under the conditions that existed—that is, a little more value under the conditions that existed at the time you mention, 1902-1903, than if it was in the Elk Hills, but it did have a little percentage." (R. 392). This was true although he regarded the property in the Elk Hills as more valuable than any land lying west of the track or the outcrop (R. 392). The only reason for developing the property lying nearer the ridge instead of that in the Elk Hills was that it was right beside the railroad. The distance of the Elk Hills from the outcrop had no influence in causing him to refrain from doing development work (R. 394). The depression in the price of oil existed all along the Pacific Coast (R. 395). He thought that the shortage of cars was not simply one symptom of a very general condition of lack of ability to handle increased production, but that it was a symptom of a desire on the part of the railroad company not to furnish the facilities (R. 396). It was true that at that time the purchase of tank cars increased quite rapidly, but there was only one company, the Associated Oil Company (a subsidiary of the Southern Pacific Company), which could obtain cars (R. 397). He was told by the railroad company that more cars were coming and that he could secure some, but, when they came, the letters "S. P." on them were painted out and "A. O." put on instead (R. 398-9). No one except the Associated Oil Company was able

to deliver oil with any certainty (R. 401). When the railroad was asked for cars, its agent simply asserted that they didn't have the cars (R. 402).

S. G. Dromillard testified that his abandonment of the Elk Hills was due to the order of withdrawal (R. 125).

John Jean stated that it was not possible to get people interested in the oil business and that his attempts to borrow money with which to do work proved failures, even though the Elk Hills were promising oil territory. He gave up his expectations on account of lack of finances (R. 130-1).

L. G. Sarnow abandoned his locations because oil went down to nothing. (R. 142).

F. D. Lowe held to his opinion that there is oil in the Elk Hills and that it is good oil country; but the depression in the price of oil continued for a long time after 1901 (R. 151).

B. K. Lee stated that he drilled a well into the oil sand about the time the slump came in the price of oil in 1901 and that from then on until the winter of 1903 things were very quiet, the price of oil not justifying the expense of putting in a pipe-line (R. 231).

J. L. Waggy, although four or five thousand dollars had been spent in township 30-23, was deterred by the withdrawal from further effort to develop (R. 251-3-5).

S. P. Wible testified that locations in 1900 and 1901 were made by parties other than those who were merely speculating and most of the operations were carried on under advice of a geologist, of whom he considered Josiah Owen the best in the field, and that all of his locations were made under the advice of competent men, referring to Treadwell and Youle. From 1903 to 1908 the oil business in the McKittrick vicinity was very dull and there was practically no new development on account of the price of oil and lack of facilities for getting rid of it. It was only once in a while you could get cars and for that reason you could not contract for the oil. The activity stopped almost entirely. In 1903 oil sold at eleven cents a barrel (R. 332-3-4).

Charles Brisco testified that there was a depression in the oil business in McKittrick in 1901, 2, 3, and 4, the cause being inability to sell because of lack of facilities for transportation. He would order cars, but he could not get them. He was actively engaged in prospecting and developing (R. 338-9).

W. G. Sylvester was prevented from developing his property in the Elk Hills because of the low price of oil. He believed those lands to be oil lands susceptible of development and production on a commercial basis. In 1901 he drilled 980 feet in section 8 of 30-23 (in the Elk Hills), but abandoned it because there was so much gas that the drilling became so expensive that he could not stand the pressure and had to quit (R. 357-8).



C. F. Whittier, an oil man of large experience, intended to do development work in the Elk Hills, but suffered an accident which made it impossible (R. 471-2). He regarded the oil character of the Elk Hills strong enough to warrant the expenditure of money in an attempt to prove its possibilities as early as 1904 and was making arrangements at that time to get money in order to locate there and do assessment work; but an injury to his knee kept him confined to the house several years and so prevented him (R. 474).

H. P. Dover abandoned his locations because of the slump in the oil business in Kern County whereby oil became a drug on the market for two or three years and no one would put money in oil property (R. 467).

N. C. Farnum and his associates spent and paid out quite a sum of money for and on their locations which they kept up until 1906, building roads through the country, doing assesment work, building a camp and maintaining at least one man there, sometimes as high as a dozen. They built a camp consisting of a one-room house and a stable about the same size, hauling water into the hills for the animals and men and all of their feed and provisions. They were about to move a rig over from Kern River into the Elk Hills to prepare for drilling, but were prevented by the action of the government in withdrawing the land (R. 501-2-3). In 1902 there was a depression in oil and a great shortage of

cars. The lack of railroad transportation facilities had something to do with the general depression of the oil business (R. 504).

W. E. Youle attributed failure of development in the Elk Hills to a lack of water, low price of oil and financial embarrassment (R. 569). He said that money was spent on the locations made on his recommendations in the Elk Hills, roads being built and assesment work done; but money was scarce and oil was cheap and transportation hard to get (R. 576).

C. W. Lamont held two sections for ten years, but didn't do any assesment work on them because he was "broke"—not because he didn't consider them worth sufficient attention. There was an oil depression in 1901 lasting for several years and it was "just as good as insulting anybody to ask them to put their money into it at that time". That was the whole reason for our failure to try to influence people there or get money to carry out the locations" (R. 583).

John R. Scupham testified that the Buena Vista Company did not prove a success on account of lack of transportation (R. 603).

Robert E. Graham, a witness for appellants, testified that in 1901 oil was sold in the field for \$1.00 a barrel to other rigs. None of it was hauled out. As soon as drilling was suspended, there was no sale for oil and drilling was suspended because the oil fell off to 12 and 15 cents a barrel about 1903 or 1904 (R. 2137).

O. E. Hotchkiss, another of appellants' witnesses, testified as follows: "I went to Bakersfield prior to my trip to McKittrick on that occasion (1900). Bakersfield was a central town for the various districts in which the oil excitement then existed. The town was very much congested with oil men, locators and speculators. The hotels were so crowded it was very difficult to get rooms at all and in the evenings one would have to elbow his way in the lobby, as it was fairly packed. This excitement continued up to the time of the discovery of oil in the Beaumont district in Texas. This drew a great many people from Kern county and the excitement died down along in 1902 or 1903. After that excitement died down everything was very flat there for some years. Oil went down to 12 and 14 cents a barrel and there was hardly any profit in producing oil even if you had a well already drilled" (R. 2091-2).

C. H. Meyes, another of appellants' witnesses, was interested in numerous locations in the Elk Hills, but after the drop in the price of oil at McKittrick lost interest in them. He did not think enough of the land to want to put any money in it as no companies were coming down that way to prospect the land so that he could get a line on what was in it (R. 206).

E. J. Miley, another of appellants' witnesses, shut down drilling in 19 or 30-22 in 1903 because he had not gotten enough production to warrant operation at the then price of oil (R. 1710). He drilled in

section 10 of 30-21 about 1500 feet; but, getting no oil, moved over to section 11 of the same township and there got some oil; but the money ran out and the oil business was bad and he had to quit and abandon his location in 1904 (R. 1710-11).

S. J. Dunlop, another of appellants' witnesses, in 1900 promoted the Mount Diablo Oil Company and commenced the actual development of section 26 of 32-23, putting a well in each quarter and making a discovery and obtaining patents from the government. After that there was quite a slump in the oil business and he let the property lie until a railroad should be built in there and there was further development (R. 1820).

L. B. McMurtry, who had been a railroad conductor on the Southern Pacific and testified for appellants, remembered that in 1901 oil was down to fifteen cents a barrel and there was no market and no transportation and the oil industry seemed falling off considerably at that time (R. 2082).

Even F. M. Anderson, appellants' chief expert and their geologist around McKittrick in 1903, admitted that the price of oil in 1903 and 1904 in the vicinity of McKittrick was from 15 to 25 cents a barrel.

L. J. King, superintendent of the Associated Oil Company, a subsidiary of the Southern Pacific Company, testified in the Land Office contest at Visalia that cessation of drilling in the majority of cases in the Elk Hills was due to lack of money and ma-



chinery and not because the land was not considered valuable for oil, and that this was true in some cases as to the Associated Oil Company, but that its cessation was only temporary (R. See Ex 9-B to O).

In the same proceeding W. A. Williams, geologist for the Associated Oil Company, testifying that the lands in the Elk Hills are more valuable for oil than for any other purpose, explained why several of the wells drilled about 1910 failed, some because they did not continue to drill long enough, others because they were unfavorably located and yet others on account of water troubles (Ex. 9 E; 9 M).

### **SUMMARY OF KNOWN CONDITIONS.**

Summarizing, these were in outline the outstanding known conditions: to the west of and as near as two miles to the lands in suit a long line of outcrop of oil sands whose commercial productivity had been proven by two hundred and eighty-one oil wells—the dip of the strata in which the outcrop and wells are towards the lands in suit—the existence in the midst of and near to the lands in suit of evidences of oil, consisting of seepages, asphalt and gas blowouts—the existence of an oil field to the east of the lands in suit, distant, to be sure, twenty-eight miles but underlaid by the same sand found in the McKittrick field to the west—the conspicuously ideal anticlinal structure of the lands in suit.

These are the conditions which were actually known to appellants; these are the conditions which

led Dr. Branner, one of the greatest oil geologists of the world, to exclaim that "a geologist who was acquainted with them and failed to form an opinion that the Elk Hills were oil in character and that there was an oil bearing zone beneath those hills did not know his business"; these are the known conditions which the government with great confidence contends were plainly such as to engender in 1904 the belief that the lands in suit were mineral lands and therefore not properly patentable to the Southern Pacific Railroad Company under the grant of 1866; these are the conditions which did engender that belief in appellants and, as the result of that belief, such a desire to have and secure these lands that they were willing, in order to do so, to falsely represent them to be agricultural in character and commit a fraud involving moral turpitude in order to acquire them.

### **LEGAL EFFECT OF THE FOREGOING.**

The government confidently asserts that the legal effect of the facts established by the evidence recited concerning the known conditions, taken in connection with the non-mineral affidavits offered by appellants in connection with selection list No. 89, is such as to entitle it, without further showing, to a decree annulling the assailed patent and, of course, to an affirmance of the challenged decree; and that such a decree would be the result of the application to these facts of the elementary and fundamental equitable principle formulated for the purpose of

remedying the effects of fraud practiced in securing the execution of instruments. One of the essential averments in the affidavits in question is admittedly false; for Mr. Eberlein testified that he had made no examination of the lands in suit and George A. Stone, upon whose knowledge of the lands Eberlein said that he relied, testified that he had made no examination of them for the purpose of selecting them and that such knowledge as he had was general in character from his general knowledge of the country (R. 1029). Furthermore, Eberlein testified that he sent no one to make an examination of the lands (R. 1137). Therefore, the statement that he had caused the lands to be carefully examined by employees of the railroad company was manifestly false and, taken in connection with the continued protests which he said he made from 1903 to 1908 against examinations of unpatented lands by oil experts of the Southern Pacific Railroad Company on the ground that what they might discover might prevent the issuance of patents, makes the materiality of the falsity of the averment in question conspicuous. As a matter of fact, it will be shown hereafter by positive and documentary evidence produced under *subpoena duces tecum* that Eberlein and his superiors believed in the mineral character of the lands in suit and went to great lengths to secure patent thereto for that reason; but, even if it were assumed that Eberlein's conduct and statements were due to ignorance, the legal result would be the same. This, of course, does not refer to the particular statement mentioned above, the falsity of

which could not have been unknown to Eberlein, but only to that part of the affidavits in which he represented the lands in suit to be agricultural lands and of the character contemplated by the grant.

In *Prewitt vs. Trimble*, 92 Ky. 176, 181; 36 Am. St. 586, Biglow on Fraud is thus cited:

“For it is elementary doctrine that a false representation may, in contemplation of law, be made with knowledge of its falsity, that is, made *scienter* so as to afford a right of action in damages, and a *fortiori*, ground for equitable proceedings (1) without actual knowledge of either its truth or falsity, as when the party has affirmed his knowledge by a positive statement which implies knowledge; (2) when made under circumstances in which the party ought to have known, if he did not know, of its falsity; as when having ‘special means of knowledge’ it is his duty to know. Biglow on Fraud, 599, 615.”

The rule is thus laid down by Kerr:

“If a man makes a representation as of his own knowledge, not knowing whether it be true or false, and it is in fact untrue, he is guilty of fraud, as much as if he knew it to be untrue. It is in law a willful falsehood for a man to assert as of his own knowledge a matter of which he has no knowledge. It is wrong to state as true what the person making such statement does not know to be true, even though he does not know it to be false, but believes without sufficient grounds that the statement will ultimately turn out to be correct.”



Kerr on Fraud and Mistake, 53, 54 (Am. Notes by Bump). See also:

*Ainslie vs. Medlycott*, 6 Ves. 13,

*Smoot vs. Ilbery*, 10 M. & W. 10,

*Bennett vs. Judson*, 21 N. Y. 238,

*Harding vs. Randall*, 15 Me. 332, 335.

Continuing, the same author says:

"If a man says what is false within his knowledge or what he has no reasonable ground for believing to be true and makes the representation with the view to induce another to act upon it, who does so accordingly to his prejudice, the law imputes to him a fraudulent intent, although he may not have been in fact instigated by a morally bad motive." *Idem* 55, 56.

Mr. Pomeroy, in his *Equity Jurisprudence*, Sec. 885, says:

"It is fully settled by the ablest courts, English and American, that there may be actual fraud—not merely constructive fraud—in equity without any feature or incident of moral culpability; that the actual fraud consisting of misrepresentation is not necessarily immoral. A person making an untrue statement without knowing or believing it to be untrue and without any intent to deceive may be chargeable with actual fraud in equity. Whatever would be fraudulent at law will be so in equity; but the equitable doctrine goes farther and includes instances of fraudulent representations which do not exist in the law."

Continuing, the same author says:

“Where a person makes an untrue statement and has at the time no knowledge of its truth and there are no reasonable grounds for his believing it to be true, he is chargeable with fraud, although he had no absolute knowledge of its untruth and may claim to have had a belief in its truth. This is the mode in which the rule is ordinarily laid down by courts of law and sometimes by courts of equity. The equity cases have, however, settled the rule in somewhat broader terms, omitting entirely the qualification ‘that there are no reasonable grounds’ for the person’s believing his statement to be true. In other words, it is settled in equity by an overwhelming weight of authority that, where a person makes a statement of fact which is actually untrue and he has at the time no knowledge whatever of the matter he is chargeable with fraud and his claim to have believed in the truth of his statement cannot be regarded as at all material. The definite assertion of something which is untrue, concerning which the party has no knowledge at all, is tantamount in its effects to the assertion of something which the party knows to be untrue”  
Idem. section 887.

“Where a person makes a statement of fact which is untrue, but at the time of making it he honestly believed it to be true and this belief is based upon reasonable grounds which actually exist, the misrepresentation so made is not fraudulent either in equity or at law. This general proposition is subject, however, to the following important limitations:.....5.  
Where such an untrue statement is made in the honest belief of its truth, so that it is the result of an innocent error, and the truth is afterwards discovered by the person who has innocently made the incorrect representation, if he

then suffers the other party to continue in error and to act on the belief that no mistake has been made, this, from the time of discovery, becomes in equity a fraudulent representation, even though it was not so originally. 6. Finally, if a statement of fact, actually untrue, is made by a person who honestly believes it to be true, but under such circumstances that the duty of knowing the truth rests upon him, which, if fulfilled, would have prevented him from making the statement, such misrepresentation may be fraudulent in equity and the person answerable as for fraud; forgetfulness, ignorance, mistake, cannot avail to overcome the pre-existing duty of knowing and telling the truth" *Idem.*, section 888.

This doctrine has been adopted by the Supreme Court of the United States which says:

"Whether the party thus misrepresenting a fact knew it to be false or made the assertion without knowing whether it were true or false is wholly immaterial, for the affirmation of what one does not know or believe to be true is equally, in morals and law, as unjustifiable as the affirmation of what is known to be positively false. And even if the party innocently misrepresents a fact by mistake, it is equally conclusive; for it operates as a surprise and imposition of the other party. Or, as Lord Thurlow expresses it in *Nevill vs. Wilkinson*, 'It misleads the parties contracting on the subject of the contract'." *Smith vs. Richards*, 13 Pet. 25, 36; 10 L. Ed. 42.

And even in an action at law the same court has approved even stronger language, for in *Lehigh Zinc & Iron Co. vs. Bamford*, 150 U. S. 665, 673, it approved the following instructions:

"A person who makes representations of material facts, assuming or intending to convey

the impression that he has actual knowledge of such facts, when he is conscious that he has no such knowledge, is as much responsible for the injurious consequences of such representations to one who believes and acts upon them as if he had actual knowledge of their falsity."

Eberlein, by resolution of the board of directors of the Southern Pacific Railroad Company of September 2, 1903, was given full power to manage, conduct and carry on the business of the land office of that company . . . . . and he was thereby fully authorized and empowered to represent that company in the United States Land Offices or before the officials thereof in person or through persons employed by him for that purpose and to represent the company in all matters pertaining to its lands at all times and places (Ex D D.). It is undisputed that Stone represented the company as fully as the Land Agent for all purposes except those limited personally to Eberlein by said resolution.

The making of the false affidavit by Eberlein that he had caused the lands selected (in suit) to be carefully examined by agents and employes of the Southern Pacific Railroad Company as to their mineral or agricultural character and that, to the best of his knowledge and belief, none of said lands contained in said list were mineral lands and that said lands were vacant, unappropriated and were not interdicted mineral or reserved lands and were all of the character contemplated by the grant (July 27, 1866), was the act of the Southern Pacific Railroad



Company, for the principal is liable for the agent's fraud.

"In the first place, it is very clear that when an agent, in doing the business of his principal and acting within the scope of the authority conferred upon him, makes fraudulent representations or concealments with the knowledge or consent of his principal, expressed or implied, so that the act of the agent is virtually that of his principal, then the principal is liable in the same manner, to the same extent and for the same remedies as though the fraud were committed by himself personally; he may even be liable in an action at law for deceit. The doctrine is carried much farther. When the agent acts beyond and even in direct opposition to his express authority, but within the scope of his implied authority—that is, within the apparent authority contained in and conferred by the terms of his commission or the nature of his official functions or of his employment or appearing from a prior course of dealing with or on behalf of his principal or from any other mode of his being held out to the world as appearing to possess the authority, and the principal is personally innocent of any fraud—the principal cannot acquire and retain any benefit obtained under such circumstances from the fraud, representations or concealments. If the principal, upon learning of his agent's fraud, should expressly ratify and adopt the transaction, he would make the fraud his own. An express ratification, however, is not necessary. If the principal receives and retains the proceeds of the agent's fraud—the property, money and the like obtained through an executed transaction—or claims the benefit of or attempts to enforce an executory obligation thus procured, he renders himself liable for the fraudulent acts of his agent. The defrauded party is entitled

to such remedies, legal or equitable, as are appropriate to the nature of the transaction. The only mode in which the principal, under these circumstances, can escape liability is by repudiating the acts of his agent and refusing to accept or retain any benefit of the transaction immediately upon his discovery of the fraud."

Pomeroy's Equity Jurisprudence, (3d Ed.) Sec. 909.

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It is somewhat difficult to follow the reasoning of appellants leading to the conclusion urged by them that the non-mineral affidavits of Eberlein were immaterial and "mere red tape". The record shows that it was the only evidence offered to the government of the character of the lands in suit. Under the grant patents could be secured only to agricultural lands, mineral lands being expressly reserved to the United States. As heretofore shown, the Secretary of the Interior in the exercise of authority conferred by Congress required that every selection list be accompanied by an affidavit identical with that filed with list No. 89. How the only evidence offered by the applicant concerning the only matter to be ascertained could be considered immaterial and "mere red tape" passes understanding. Certainly the government, which through its Department of the Interior promulgated July 9, 1894, the regulation which prescribed in effect that no patent to lands granted to railroads should issue unless the selection thereof was accompanied by the affidavit in question, can by no sort of reasoning be held to

have regarded such an affidavit as immaterial and mere matter of form. That it was the most important and most material thing in the entire process of selection is manifest.

In *Cosmos Exploration Company vs. Gray Eagle Oil Company*, 104 Federal, 33, an affidavit similar in form to the Eberlein affidavit came under review. Judge Ross, who decided that case, held that, even if it were conceded that the affidavit was not required either by the statute or by any rule or regulation of the Land Department, the fact remained that "the affidavits were made and filed in support of the selection and constituted a representation and one of the means by which the selectors sought to secure the lands; and, being made and used for the purpose of evading and defeating the laws of Congress, as well as of defrauding the claimants under the mining laws, no court of equity should lend them its aid in securing the fruits of the fraud."

This language of Judge Ross answers conclusively the contention of appellants in the instant case; and here the case is stronger for the reason that the Eberlein affidavits were absolutely required by valid regulation of the Land Department and without it the selection list would and could not have been considered by the Land Department, the language of the regulation being "the railroad company will be required to file with the local land officers an affidavit by the land agent of the company . . . . setting forth in substance that he has caused the

lands mentioned to be carefully examined'' etc (19 L. D. 21.)

In support of the contention of the government that, upon the showing hereinbefore referred to and without regard to the positive evidences of fraud hereafter to be presented, it is entitled to a decree in this court affirming the decree below annulling the patent, reference is once more made to the case of *Cosmos Exploration Company vs. Gray Eagle Oil Company, supra*, the leading case in this circuit upon the question here involved. In that case the assignee of a forest lieu selector who had applied for certain public lands under the exchange provisions of the act of Congress approved June 4, 1897, brought suit to enjoin the defendants who had gone upon the selected lands and were engaged in developing and removing oil therefrom. The selector had filed the usual non-mineral affidavit alleging that the land did not contain minerals and was not mineral land. It was claimed on behalf of the defendants that the land was known to be mineral land at the time of the selection and that the selection was made because of that fact and with the sole purpose of acquiring mineral lands excluded from the operation of the act in question. It was contended by the plaintiff, as by appellant in the instant case, that, inasmuch as there had been no actual development or discovery of oil upon the land at the time when the forest lieu selection was perfected, consequently the lands were not known mineral lands at that time and therefore could not with propriety be selected. From the



evidence adduced Judge Ross found that the selector at least believed the lands selected to be oil lands and not agricultural, and thereupon, referring to the non-mineral affidavits, says:

"If, instead of these palpably false and fraudulent statements, the affidavits accompanying and in support of the selection had stated the truth—had stated that the applicants at least believed the lands sought contained oil and that they wanted them for that purpose and for that purpose only and desired to select them under the law authorizing agricultural lands to be taken in exchange for lands situated within a forest reserve that had been surrendered to the government—one cannot doubt that the officers of the local land office would have refused to file or receive the selection of such lands under the forest reserve lieu land act."

If in the instant case Eberlein had told the truth and had represented that he had caused no examination of the lands in suit to be made, but that he and other officials of the Southern Pacific Railroad Company and the Southern Pacific Company believed that they contained oil, it does not admit of doubt that the Register and Receiver at Visalia would peremptorily have rejected the attempted selection. If Eberlein had done even less than this and had made an affidavit that he had not caused the lands to be examined by the servants of the railroad company and knew nothing whatever of their character, whether mineral or agricultural, as were the actual facts in this case, as appears from his own testimony, it cannot be doubted that the attempted selection would have suffered the same fate. In a

word, if Eberlein, instead of making false representations, had told the truth or even a substantial part of the truth, the assailed patent would never have issued.

The government cannot, in closing the argument upon this phase of the case, do better than adopt the following language of Judge Ross in the *Cosmos Exploration Company* case:

“In *Finn vs. Hoyt, D. C.* (52 Federal 83), a suit was brought by the United States to cancel two patents that had been issued by the government to defendants in the suit for certain lands alleged by complainant to be mineral lands and that were known to be such by defendants at the time they were purchased as agricultural lands and concerning whose character the defendants made to the government officers at the time of the purchase false and fraudulent statements. The court found that the preponderance of the evidence showed that the lands were valuable for mineral and that the defendants knew that fact at the time they represented them to be agricultural and, accordingly, acquired the patent, citing a number of cases in support of its decision. Surely, if a court of equity would annul a patent issued under such circumstances, as it undoubtedly would, it should not grant any equitable relief in advance of patent in respect to claims based upon like false and fraudulent representations.”

(The citation of *Finn vs. Hoyt* is an error, as the title of the case is *U. S. vs. Culver*.)

It is confidently submitted that by far more than “the preponderance of the evidence” in this case it

is proven that the lands in suit at the time of their selection were valuable for mineral and that the defendants knew that fact. Judge Ross says that a court of equity, under such circumstances, "undoubtedly would" annul the patent.

#### 4. FRAUD.

The proofs by appellants Southern Pacific Railroad Company of the character of the lands in suit offered in connection with its selection thereof were false and fraudulent and were calculated and intended to and did deceive the land officers of the government.

##### Introductory:

Enough has already been shown to warrant the conclusion that Judge Bean committed no error in rendering the decree from which this appeal is prosecuted and the government might with great assurance rest its argument at this point; but the record is so filled with positive and documentary evidence of the fraud and deception practiced by appellants that the government is under the duty of inviting the attention of the court to it and of setting it out somewhat in detail.

Of the evidence upon this phase of the case Judge Bean, after finding that the statement in the affidavits of Eberlein that he had caused the lands to be carefully examined was admittedly false and that Eberlein himself testified that he knew nothing of their character or contents at the time when he made the several affidavits and that the insistence of the appellants throughout the case had been that no examination of the lands to ascertain their mineral contents had been made prior to the issuance of the

patent, although they had for a year or more maintained a corps of expert oil geologists who were actually engaged in examining and classifying lands in the vicinity for the purpose of ascertaining their character, says:

“I think it clearly appears from the documentary evidence in the case and particularly from the correspondence from Eberlein’s files (a portion of which was kept separate from the general files of the office and guarded with the utmost secrecy until compelled to be produced on this hearing) that at the time the selections were made and patent issued the officers of the company in charge of the matter were conscious that the lands were, if not actual, at least probable oil-bearing and that the selections were made and strenuously urged to patent for that reason and not because of their agricultural value.” (R. 72-3.)

A history of selection list No. 89 has already been set out in this brief and will not be repeated here except insofar as may be necessary to a proper understanding of the evidence.

**Direct and positive evidence of fraud:**

This evidence consists of certain oral proofs and admissions and, in addition, a series of secret and confidential papers embracing the correspondence between high officials of appellants, the acting land agent of the Southern Pacific Railroad Company and legal counsel in San Francisco and Washington, D. C., of both the Southern Pacific Railroad Company and the Southern Pacific Company. A portion of this correspondence had been, at the suggestion of



Judge W. D. Cornish, vice-president of the Southern Pacific Company and president of the Southern Pacific Railroad Company (R. 1132-3), carefully segregated from the general files of the land agent and preserved in a file in the safe-deposit vault of the California Safe Deposit and Trust Company in San Francisco, while a portion of it of a secret and confidential nature had been segregated from the files of the office of Judge Cornish in New York and placed for safe keeping in a desk in the latter's private residence in East Orange, New Jersey. An examination of this correspondence will hereafter make clear the reasons for its concealment.

Prefatory to an extended examination of this correspondence, however, it may be well to consider the following evidence in the record in support of the finding of Judge Bean that the correspondence in question "was kept separate from the general files of the office and guarded with the utmost secrecy until compelled to be produced on this hearing" (R. 73).

Eberlein testified that the correspondence in question was not kept in the files, but in the safe-deposit vaults of the California Safe Deposit and Trust Company and, when needed, was brought into the office and kept in the safe (R. 1082). This correspondence related to the projected lease to the Kern Trading and Oil Company of which much has already been said and of which more will hereafter be written. Judge Cornish, the high officer to whom

Eberlein was responsible and reported, instructed him to keep them to himself, saying that they might thereafter be necessary for the protection of both of them. Both of them recognized at least the very ambiguous position in which they were placed, if the lease to the Kern Trading and Oil Company were made and especially if Eberlein made the lease, he having also made the selection list which was at that time unapproved (R. 1128). In support of that list he had made an affidavit under oath that the lands included therein were non-mineral in character. "The fact that he had made such an affidavit, believing the fact to be as stated, it did not seem good policy for him to turn around and make a lease of lands which were in juxtaposition to the selected lands and he believed and Judge Cornish believed thoroughly that it might give rise to trouble" (R. 1129). He "naturally would expect that, if the lease were made at that time, with those lands mixed up as they were or adjacent, that the government of the United States, having in mind that they were very active about that time in 'nosing' into everything that affected railroad lands, would be very apt to call that lease at least in question and make an effort at least—or hold it up or entirely knock it out". In other words, he said, the effect would have probably been to completely preclude the possibility of the Southern Pacific Railroad Company acquiring title under that list (R. 1130). After the fire of 1906 Judge Cornish, assuming that Eberlein's copies of this correspondence had been destroyed, notified him in his private car out of Ogden in the Fall of 1907, that, "inasmuch

as these letters, reports from me, that he held having come from me in all these years, inasmuch as the papers of the company in the land office were destroyed, why he destroyed those"—Eberlein understanding him to say that he had destroyed all of the papers which he, Cornish, had received from him, Eberlein (R. 1074-5).

As a matter of fact, while the correspondence in question was damaged by the fire of 1906, it was not actually destroyed and thereafter copies were caused by Eberlein to be made from the scorched remains. George A. Stone had charge of this work and assigned the copying to Lottie Abrams who subsequently married and testified as a witness for the government under the name of Charlotte Dorothy Cunningham (R. 1319). She identified her initials on each of Exhibits "JJ" to "SS" inclusive, constituting the correspondence in question, as also the initials "H. K." of Herman Koch, a fellow employee in the land office of the Southern Pacific Railroad Company. The copying was done two weeks after the San Francisco fire of April 18, 1906 (R. 1320). She copied these exhibits from the burned originals of letters which were handed to her by George A. Stone who told her to keep them as they were and compare them with Herman Koch and then return them to him, Stone. Stone told her to go over and sit at one side of the room near a little bay window and compare them with Koch in an undertone. He cautioned her not to allow them to get out of her hands, but to keep them herself and to return them

to him personally (R. 1321). She was impressed by Stone's manner with the fact that "these papers were practically private". While she and Koch were comparing them, "Mr. Stone hovered around a great deal" (R. 1323).

**George A. Stone's threats of exposure.**

Light is thrown upon this situation by the subsequent use to which Stone with success put his knowledge of the contents of the papers constituting this correspondence. Differences arising between him and his chief, Mr. Eberlein, the latter advised him that his services would terminate December 31, 1907 (R. 1029). The fact that, when subpoenaed as a witness for the government, Stone at once went to the general counsel of the railroad and to counsel for appellants and notified them that selection list No. 89 was made up at the suggestion of Professor E. T. Dumble, shows that he was an unwilling witness for and hostile to the United States (R. 1030). He was at the time a pensioner of the Southern Pacific Company and on the payroll of the Southern Pacific Railroad Company (R. 1030). He testified that he wrote to Mr. Kruttschnitt about his discharge, but that he had no recollection of stating that he would lay before the Department of Justice and give to the press what he considered an irregularity in the selection of the lands in suit unless he was re-instated (R. 1031), but that he probably threatened at one time to do so. The letters which Stone actually wrote in this connection were not in evidence at that time. Later, Mr. Julius Kruttschnitt, formerly general



manager and at the time of testifying the highest officer of the Southern Pacific Company, no doubt familiar with the fact that Stone had testified that he had probably written threatening letters, made a virtue of necessity and, when called upon for the letters in question, produced them. The first of these letters, dated January 8, 1908, was addressed to E. E. Calvin, then vice-president of both the Southern Pacific Company and of the Southern Pacific Railroad Company. Calvin first appears as an official in 1905, the year following the date of the patent, when he succeeded Mr. Kruttschnitt as vice-president. He, therefore, was presumably ignorant of the fraud in question and therefore Stone's letter to him was of a character quite different from those which he thereafter wrote to officials who he doubtless thought had guilty knowledge of the transactions resulting in the assailed patent. His letter to Mr. Calvin was as follows:

"Dear Sir: Have received a letter from the Acting land agent of the Southern Pacific Railroad Company advising me that my resignation as assistant land agent was accepted, to take effect December 31, 1907. As I have not tendered my resignation and am not aware of any good cause for dismissal, it would appear that I am to be dropped to satisfy the whim or prejudice of an erratic official, and as this is not the kind of treatment usually accorded to employes by the Southern Pacific Company, I hope that you will, in fairness to me and for the best interests of the company, carefully investigate the matter and arrange for a transfer to some other employment. I commenced service as a flagman with engineering party of Central Pacific

R. R. Co. July, 1865, and have been in active service of the Harriman System over thirty-five years, during that period serving as engineer on reconnoissance, location, construction and maintenance under Mss. Montague, Clement, Curtis and Hood, and for the past ten years in the Southern Pacific Land Dept. as land examiner under Madden and assistant land agent under Eberlin.

“Recent illness and death in my family have prevented my earlier submission of the matter.

Yours respectfully,

“GEO. A. STONE,

“169 10th St., Oakland, Cal.”

“Copy to Mr. Kruttschnitt,

“Copy to Judge Cornish.

(Ex. 5-O; R. 3118-19.)

A copy of the foregoing letter was mailed the same day to Mr. Kruttschnitt and in the letter transmitting it language is used the aptness of which could not fail to be apparent to one who shared in Stone's guilty knowledge. That letter follows:

“Dear Sir: I enclose herewith copy of letter mailed today to Mr. Calvin asking for transfer from Land Dept. to other service. As land examiner and assistant land agent I have obtained a knowledge of the lands and records not possessed by any other official or employee of the company, but notwithstanding this, and that I have for several years borne a large part of the burden, Eberlein has seen fit to force me out. I think the quality of my work and *the confidential character of my employment in land*

*department indicate that the best interests of the company will be served by not turning me down after long and faithful service. Mr. John D. Isaacs has known me for many years.*

Yours respectfully,

"Geo. A. STONE,

"169 Tenth St.,

"Oakland, Calif."

(Ex. 5-N; R. 3117-18.)

In reading the foregoing letter it requires no great gift of penetration to recognize the element of threat and appeal to fear. Stone could have been no more forceful nor effective if he had simply written: "Be careful how you turn down a man who knows as much about the record of the Southern Pacific Company in connection with securing patents as I know. If you are not willing to consider me, you will do well to consider the interests of the company."

Mr. Kruttschnitt testified that he regarded this letter as "impudent and cryptic", but that he did not have Stone peremptorily discharged because he had no jurisdiction of him or Mr. Eberlein (R. 3119). At that time Mr. Kruttschnitt held a very important position in Southern Pacific affairs and his explanation that he overlooked impudence on the part of a subordinate for the mere reason that he was in another department is far from satisfactory. If he actually lacked the power to discharge, a mere word from him to Judge Cornish would have been sufficient to rid the service of an "impudent" subordinate who wrote "cryptic" letters. That he was in fact

disturbed is shown by the circumstance that he took Stone's letter with him on a trip to New York and conferred concerning its contents with Judge Cornish; for on Febraary 13, 1908, he wired Judge Cornish as follows: "You were to advise me further in regard to George A. Stone." Although he is not shown to have heard from Stone in the meantime, he again, namely, February 19, wired Judge Cornish from Chicago asking the latter to let him know what the trouble was with Stone (R. 3121).

February 24 Judge Cornish wired Mr. Kruttschnitt:

"As near as I can judge George A. Stone was dropped in the interest of economy and because he was no longer fit for the kind of work he preferred to do." On the same day Mr. Kruttschnitt wrote Mr. Calvin as follows:

"Referring to letter to you from George A. Stone dated January 8, a copy of which he sent to me, in reference to the matter of termination of his services with the Southern Pacific Company. I quote below a telegram from Mr. W. D. Cornish of this date which explains the action taken in this case,"

quoting telegram of that date already set out.

In the meantime, on February 14, 1908, Stone, having received no satisfactory answer, wrote Eberlein as follows:

"Dear Sir:

"Will you kindly advise me whether the company is willing in any way to show its apprecia-



tion of my faithful service of over thirty-five years? If the company has no further use for my services, as would appear from recent correspondence with yourself and other officials, it seems to me that, as I have nearly doubled the length of service required for retirement, I may properly be placed on the shelf with disabled and superannuated veterans. Thanking you in advance for your kindly offices in my behalf, I remain,

“Yours truly,

“GEORGE A. STONE.”

(Ex. 5-M; R. 3117.)

On March 23, 1908, coming squarely into the open, Stone addressed Mr. Kruttschnitt at San Francisco in language of unveiled meaning as follows:

“Dear Sir:

“On January 8, 1908, I addressed you at Chicago enclosing copy of a letter I had that day sent to Mr. E. E. Calvin relative to action taken by Mr. Eberlein in forcing me out of my position as assistant land agent. To this letter Mr. Calvin replied briefly that he had no jurisdiction over the affairs of the land department and could offer me no other employment.

“On February 14, 1908, I addressed a letter to Mr. Eberlein (copy enclosed herewith) suggesting retirement if my services were no longer desired by the company. To this letter no reply has been received.

“I served the company faithfully and well many years and hoped that its interests would always be mine, but *if a hearing and fair treatment are not accorded me without further delay my services will be at the disposal of the newspaper press, the United States Attorney General and others.*

“Trusting that you will be able to give this matter some attention while in San Francisco, I remain,

Very respectfully yours,

“GEORGE A. STONE,  
 “2635-A Channing Way,  
 “Berkeley, Calif.”

(Ex. 5-L; R. 3116-17.)

Mr. Kruttschnitt's reply to this letter, it is submitted, is not such as would be expected from one who was conscious both of his own innocence and a clean record in the affairs of the company whose trusted officer he was. If Stone had been bluffing or attempting blackmail and Mr. Kruttschnitt had believed that he was doing so, it requires no effort of the imagination to conceive that his reply would have been radically different from that which he actually made. Stone's letter was dated March 23d. The answer from Mr. Kruttschnitt was written the same day. No comment is needed either upon that circumstance or upon the compromising and conciliatory character of the reply that he had no jurisdiction over the land department and was referring Stone's letter to Judge Cornish (R. 3120).

The result of the correspondence thus cited, to-wit, the immediate pensioning of Stone, is eloquent of the effectiveness of his threats and of the fear under which they put those to whom they were addressed. As long as he spoke in terms of his long service and devotion to his employer, deaf ears were turned to his request; but, as soon as he changed his course and wrote boldly of what he would do if his demands

were not met, "impudent" though he was to his superior officers, he received the reward of the faithful. As long as he was "cryptic", he was ineffective; as soon as he became open and direct, he was successful. That he was pensioned Stone himself testified (R. 1030). Mr. Kruttschnitt testified that, if Stone was entitled to a pension, granting it was no favor to him, since it was a right already given him and all other employees years before by the board of directors (R. 3121). It is passing strange that the railroad's action under the circumstances was such that Stone was compelled to have recourse to the impudent and insulting language set out in his letters.

**Eberlein takes charge of the Southern Pacific Railroad Company's land office.**

Reverting for a moment, it is important at this point to note that prior to the events last treated C. W. Eberlein had come to San Francisco in June, 1903, to take up the matter of the consolidation and reorganization of certain land grants and that later, about August 3, 1903, he was appointed acting land agent of the Southern Pacific Railroad Company. The formal resolution of the board of directors appointing him acting land agent was adopted September 2, 1903, and is set out on pages 1038-9 of the record. The last paragraph of the resolution, by ratifying and confirming all acts theretofore done by Eberlein as acting land agent within the purview of the resolution, shows that Eberlein had begun his work before the resolution was adopted. It was during the very next month, October, that the original

selection list No. 89 was prepared pursuant to Professor Dumble's coming in and pressing the selection of the lands in suit (R. 1029); and it is to be remembered that it was then that Eberlein, new to the work in California and without knowledge, as he himself testified, of the lands in suit, but relying, as he said, upon the knowledge of George A. Stone (R. 1136), who in turn testified that such knowledge as he had of the lands was general in character based upon general knowledge of the country (R. 1029), made one of the non-mineral affidavits alleged by the government to have been false and fraudulent. The list and affidavit were prepared by Stone and were presented to Eberlein for his signature (R. 1136-7). Stone had at no time examined the lands in suit (R. 1029); Eberlein knew nothing whatever of them (R. 1137) and sent no one out at any time to make an examination of them. In the light of this situation the positive and unequivocal character of the affidavit is, to say the least, interesting. It is here repeated:

“Charles W. Eberlein being duly sworn, deposes and says that he is acting land agent of the Southern Pacific Railroad Company; that he has caused the lands selected in said company's list No. 89 to be carefully examined by the agents and employees of said company as to their mineral or agricultural character and that, to the best of his knowledge and belief, none of the lands returned in said list are mineral lands.”

The patent was issued December 12, 1904. In February, 1900, the lands in suit, together with forty-four other townships, had been suspended from dis-



position by the Commissioner of the General Land Office (Ex. QQQ; R. 1524-5). The township containing the lands in suit had not then been surveyed and, consequently, the lands in suit were not susceptible of any form of entry under the land laws of the United States. The township was surveyed during 1901 and 1902 and the survey, including the plat and field notes, was formally approved and filed August 1, 1902 (Ex. "E"; R. 107). In that survey the lands in suit, because of their supposed oil character, had been returned as mineral lands and within a mineral district. Meanwhile, following up the geological examinations in 1887 by the railroad company through John R. Seupham, consulting engineer of the directors of the Southern Pacific Company and the Southern Pacific Railroad Company (R. 585), the railroad continued its examinations through J. B. Treadwell, oil expert of the Southern Pacific Company, with the result that Treadwell prepared a certain map bearing the date of September 17, 1902, and introduced in evidence and known as Exhibit 115, on which he showed in red color all of the odd sections of land falling within the indemnity limits of the railroad company's grant which he at that time caused to be reserved from sale for agricultural uses "because in or near oil territory", thereby indicating his belief that they were oil lands. This policy on the part of the railroad of withdrawing its oil lands from sale, instituted presumably by Treadwell, was adopted and followed up by those who succeeded him in the railroad's employ. The map in question bears witness to the withdrawal by Treadwell because

of their oil possibilities and the reservation from sale for agricultural uses of lands immediately adjoining the lands in suit on the north, west, south and east, those on the south in the same and adjoining town- on the west in the same and adjoining townships, those on the south in the same and adjoining townships and those on the east in the same and adjoining townships. Thus, Treadwell had in 1902 reserved from sale, because in or near oil territory, twenty-three sections or parts of sections actually in the Elk Hills, including all of the sections or parts of sections in the township containing the lands in suit patented to the railroad company, nine in number.

Treadwell first took the stand as a witness for the government and, when questioned on cross-examination by counsel for appellants, said: "I know the Elk Hills. None of my withdrawal orders took in any portion of the Elk Hills" (R. 435). Exhibit 115, the map in question, was not introduced in evidence until several months later, when Professor E. T. Dumble, consulting geologist of the Southern Pacific Company, was on the stand as a witness for appellants. *There was originally no suggestion from Treadwell that his reservations or withdrawals included lands other than those which he believed contained oil*; but later, when as a witness for appellants he was confronted with Exhibit 115, his own map, and was face to face with a record made by himself in 1902 which flatly contradicted his testimony in 1912 that he made no withdrawals in the Elk Hills, he confessed and tried to avoid by saying that

while his reservations had included lands in the Elk Hills and in the very township in which the lands in suit lie (R. 3423) and he got the data or information upon which he made reports respecting withdrawals from personal examinations, his reservations went beyond where he ever expected to get oil (R. 3424). In explanation of the fact that, although he shaded as oil lands the sections on all sides of the lands in suit, he did not so shade the lands in suit, he said that the reason for not doing so was that they were then unsurveyed (R. 3458-9). Survey of the lands in suit, as heretofore noted, had been filed and approved in the month preceding that in which Exhibit 115 was made; but Treadwell did not know of this, as is shown by the fact that the section lines across the lands in suit are dotted broken lines which indicate unsurveyed lands.

At the time in question Treadwell was subject to the orders of C. P. Huntington, H. E. Huntington and Julius Kruttschnitt, vice-president of the Southern Pacific Railroad Company and assistant to the president of the Southern Pacific Company (R. 426), as well as of E. H. Harriman, president of both the Southern Pacific and the Southern Pacific Railroad Companies. When a controversy arose between Treadwell and Jerome Madden, the predecessor as land agent of Mr. Eberlein, on account of Treadwell's recommendations of the withdrawal of lands from sale by the railroad at agricultural prices, Mr. C. P. Huntington settled it by ordering Madden to withdraw from sale any lands that Tread-

well recommended (R. 426-7). During this time Treadwell made reports to H. E. Huntington and Julius Kruttschnitt; so that, as early as September 17, 1902, the date on which Exhibit 115 was prepared, Treadwell had not only examined the lands in suit, which were then unsurveyed, as he thought, but all of the lands in the Elk Hills adjoining the lands in suit on all sides and had indicated upon his map and doubtless in his reports as oil land every section of land in the Elk Hills which at that time was either surveyed or patented, omitting the lands in suit from his recommendation that they be reserved from sale because of their oil character, not because he did not believe them to contain oil, but solely because at that time they were unsurveyed, as he believed, and unpatented (R. 3458-9).

The circumstances under which Josiah Owen began his labors as oil geologist of appellants around McKittrick and the work which he did and the reports which he made have already been set out. Before leaving San Francisco Mr. Owen, after conference with Mr. Kruttschnitt, was provided with maps showing the company's holdings, including Exhibit 115 which Treadwell had returned to Jerome Madden, the land agent at that time. Dumble testified that he received the map from the latter in December, 1902, and had kept it in his possession until produced in this case (R. 2901). Thus, it has been shown that both Owen and Dumble were familiar with the policy of withdrawing oil lands from sale as early as 1902, which policy Dumble continued in force (R. 3004).



Owen went from San Francisco to McKittrick during September, 1902. In November Dumble accompanied Treadwell to the McKittrick field to inspect the oil properties (R. 2902-3-4) and reported to Kruttschnitt by letter of December 4, 1902, the results of his trip (Ex. 117; R. 2906), the report being in the form of a letter which concluded as follows:

"I propose to take up their examination in a systematic way during the coming year in order to determine as far as can be done *from surface indications and geological structure where oil is to be expected in this region with especial reference to deposits near any of the lands.* So far as I can judge from a trip which I have just made over this territory, this work promises results of the greatest value to the company" (R. 2907).

In March, 1903, Dumble took active charge and assumed full direction, Owen working under him and having charge of the oil fields (R. 2907). Thereafter followed Owen's report of March 25, 1903, heretofore referred to, in which he stated that there was but one oil horizon and that he had traced its outcrop all the way to Sunset and found that there was but one oil sand which he believed it would be possible to trace to the Kern River fields (R. 1619-20).

Some time in the Fall of the year 1903 and after a thorough examination made by Owen in the field and report to Dumble which Dumble in turn transmitted to Mr. Kruttschnitt (R. 2912), Dumble went

into the land department of the Southern Pacific Railroad Company in San Francisco and, in the presence of George A. Stone, assistant to Eberlein, the acting land agent, suggested that the lands in suit be selected. Stone's words as a witness were:

"The lands mentioned", meaning the lands in suit, "were placed in that list at the suggestion of Mr. E. T. Dumble, I think" (R. 1029). He also said: "I regard the selection of these lands as irregular. Mr. Dumble, as the geologist, I thought pressed the selection for reasons best known to himself. I supposed as a geologist he thought they were oil lands. He pressed the selection of this land probably within thirty days prior to the list in 1903, not earlier than September nor later than November, 1903. This occurred in October of that year."

After Dumble came in and pressed the selection of these lands, Stone, under the direction of Eberlein, started the office force to prepare the list and, because of the hurry incident to Dumble's "pressing," caused to be set aside the work of making up new records and lists of lands in which they were busily engaged at that time (R. 1030). It has already been shown that Stone at no time made any examination of the lands embraced in list No. 89 and had no knowledge of them except such knowledge as was general in character from his general knowledge of the country (R. 1029).

A brief review of some important evidence is necessary as introductory to and explanatory of what is to follow:

March 25, 1903, Owen had made to Dumble his report in which he described the "fold north of the McKittrick" and transmitted the map, Exhibit 157, showing the anticline running from section 6 of 20-22, on which there were two producing wells (Exhibit 11a), through the lands in suit. "This fold," he wrote, "exposes the oil sands in several places and in some of the exposures the sands are strongly impregnated with asphaltum and *producing wells ought to be found along this exposure.*"

A comparison of Exhibit 157 with Exhibits 4-Sa and 4-Sb, a plat contained in a note-book carried constantly in the field by Josiah Owen and produced under *subpoena duces tecum* by his son (R. 1638), shows the former to be but a finished reproduction of the latter. It is evident that the plat book was in existence prior to March 25, 1903. The Exhibit 4-Sc, which is a portion of the plat-book near the end, is dated "October 15, '04," while Exhibits 4-Sa and 4-Sb are pages 44 and 45 of the same plat book found considerably in advance of the middle of the book. It is to be presumed, therefore, that Exhibits 4-Sa and 4-Sb were made by Owen prior to the entries following it many pages after and that, since Exhibit 4-Sc, found near the end of the book, is dated October 15, 1904, Exhibits 4-Sa and 4-Sb were made considerably prior to that date.

Dumble admits that he received Exhibit 157 with the report of March 25, 1903, from Owen (R. 2977) and, although he admits that on September 21, 1903,

he sent two maps to Kruttschnitt, he denied that Exhibit 157 was among them (R. 2977). Appellants offered in evidence as one of the maps sent Mr. Kruttschnitt by Dumble September 21, 1903, Exhibit 156; but the letter in question speaks of "the attached maps" and this must mean at least two. Whatever the other map or maps was or were, no offer of it or of them was made by appellants. Mr. Kruttschnitt also denied having received Exhibit 157. The fact remains that Dumble's letter of September 21, 1903, to him referred to "untested anticlinals which show good indications of oil" which represented the third class of "probable oil lands" referred to in the same paragraph. The only map produced in evidence in this case which shows an untested anticline is Exhibit 157, which was transmitted to Dumble in Owen's letter of March 25, 1903, the untested anticline being, in the language of Owen, "the fold north of the McKittrick." Appellants showed great ability to procure old maps from persons with whom the government failed. For instance, Treadwell as a witness for the government stated that all his maps burned in the San Francisco fire of 1906, while, when called as a witness for defendants, he produced several that accidentally had found their way into certain files in Los Angeles and had thereby escaped the destroying flame. Professor Dumble in the letter of September 21, 1903, speaks of *maps*; but appellants have produced only one. It seems fairly certain, then, that Mr. Kruttschnitt was in error in denying that he received a copy of Exhibit 157. Exhibit 156 shows



no "untested anticlinals" and it is the only map which appellants are willing to admit that Mr. Kruttschnitt received.

It is respectfully submitted that the map which delineated the only "untested anticlinal" shown upon any map introduced in evidence is, logically and with great certainty, the map which Dumble would have sent and actually did send to Mr. Kruttschnitt.

Five days after receipt of this letter from Dumble of September 21, 1903, referring to the untested anticlinal maps Kruttschnitt received from Eberlein what we may here term for convenience the first or beginning of the correspondence containing positive and direct evidence of the fraud of appellants in securing the assailed patent. That letter itself is not in the record, but that it was written appears from a letter of October 12, 1903, from D. A. Chambers, the Washington, D. C. attorney of appellants, to Mr. Kruttschnitt in which the former writes:

"Mr. Eberlein says that no selection of any of these lands had, when he wrote, been made by the Southern Pacific Railroad Company, but that he expected to tender a selection list within a week or ten days from the date of his letter to you and he suggested that you might ask that special attention be given here to the patenting of this list." (R. 1474-5.)

In the first paragraph of the letter acknowledgment is made of the receipt of a copy of a letter from Eberlein to Mr. Kruttschnitt of September 26;

so that the date of Eberlein's letter to Kruttschnitt is fixed as of September 26, five days after the receipt by Mr. Kruttschnitt of Dumble's letter referring to untested anticlinal maps (R. 1474-5).

October 12, 1903, Chambers wrote to Kruttschnitt the letter from which the foregoing is quoted and stated that, as soon as Eberlein tendered the list for the lands in suit and it was transmitted to the General Land Office, he would "at the earliest possible date urge the issuing of a special patent for the lands selected" (R. 1475). He added, however, that the lands in 30-23, together with those in a great many other townships, had been suspended from disposal by telegraphic order of the Commissioner of the General Land Office of February 28, 1900, "*upon allegations that the said townships contained petroleum*" (R. 1476); that upon inquiry he had found that this withdrawal had not been revoked "and will not be until a special agent has reported that said lands are not petroleum lands", but that, if Eberlein would write him "just what lands he desires to select in township 30 S., Range 23 East," he could ask the Commissioner of the General Land Office to direct special agent Ryan to examine said lands as quickly as possible and make special report as to their character (R. 1476). He presumed that the Register and Receiver would not approve the selection because of the outstanding order of February 28, 1900, and enclosed a copy of his letter to Mr. Kruttschnitt to be handed to Eberlein. On the witness stand Mr. Kruttschnitt denied that he knew

anything whatever about these lands; but this statement does not appear to agree with his acts at the time of the proceedings which resulted in the patent.

On October 19, 1903, Chambers wired Eberlein to select the lands regardless of their suspension (R. 1479); and on October 24, 1903, he again wrote Eberlein suggesting that, if the Register and Receiver refused to accept the list he should take an appeal to the Commissioner (R. 1480-1). Thus, it is shown that Mr. Kruttschnitt's action is contradictory of his statement as a witness in 1912 that he was wholly ignorant of any knowledge of the lands in suit. On October 9, 1903, Mr. Kruttschnitt thought so much of these lands that he wrote the quoted letter to Mr. Chambers while en route and requested the latter to endeavor to secure special attention to patenting them.

During the correspondence to which reference has just been made George A. Stone was busy preparing list No. 89 following Dumble's visit to the land office of the railroad on which he pressed the selection of the lands in suit. Eberlein stated that he knew nothing whatever of the lands and Stone, his assistant, had never been on them, nor had Eberlein sent anyone out to examine them before making his non-mineral affidavit. Do not these facts of themselves point to the belief of Dumble in the mineral character of the lands and to the truth of Stone's statement that he, Dumble, pressed their selection for that reason? At that very time Dumble had in

his possession Treadwell's map of September 17, 1902, Exhibit 115, showing withdrawals because in or near oil territory of lands surrounding on all sides the lands in suit; Owen's report of March 25, 1903, in which he stated that the oil sands were exposed in several places and that producing wells ought to be found along the exposure; and Exhibit 157 delineating the Elk Hills anticline across the lands in suit. Other work in Eberlein's office was placed aside so that list 89 could be promptly prepared and a few days later, September 26, 1903, Eberlein wrote Kruttschnitt that he expected to tender a selection list of the lands in suit within a week and suggested that he ask that special attention be given to the patenting of that list, despite which Mr. Kruttschnitt testified that he knew no more about these lands than if they were at the North Pole. Immediately thereafter, that is, on November 7, 1903, Eberlein, because required by pertinent regulation of the General Land Office, attached to the list an affidavit in which he falsely swore that he had caused the lands to be examined by agents and employees of the company and that none of them was mineral land. The list in question, accompanied by the non-mineral affidavit, was then tendered to the Register and Receiver at Visalia and was received by them November 14, 1903 (R. 3752). It is again pointed out that Eberlein on the witness stand admitted that he had never examined the lands nor instructed anyone else to do so and personally knew nothing whatever of their character (R. 1088).



Departing for a moment from the chronological order of the events now being outlined, attention is directed to a letter of December 10, 1903, from Eberlein to Chambers in which the former wrote as follows:

"I am particularly anxious in regard to this list as the lands adjoin the oil territory and Mr. Kruttschnitt is very solicitous in regard to it."  
(R. 1577, bottom of page.)

The reference is to selection list 89 and the lands in suit and this contemporary statement illy comports with the subsequent pose of ignorance on the part both of Mr. Eberlein and Mr. Kruttschnitt.

On November 17, 1903, as expected, the Register and Receiver rejected the list because the township containing the lands therein described had been suspended from acquisition (R. 3756). On November 30, 1903, Chambers asked the General Land Office to have an investigation made (R. 1483) and wired Eberlein on the same date recommending an appeal to the Commissioner of the General Land Office from the rejection by the Register and Receiver at Visalia of the list in question (R. 1481).

On December 10, 1903, Chambers wired Eberlein that the Commissioner of the General Land Office had on that date directed an examination of the lands in suit to be made and that he presumed the special agent was Mr. Ryan, but he was not advised positively of this (R. 1482). Here we find the Washington attorney of the Southern Pacific Com-

pany and the Southern Pacific Railroad Company successfully predicting who would be the special agent chosen by the Commissioner to make report.

On the same date, December 10, 1903, Eberlein wrote Chambers the letter already referred to in which he stated that he was particularly anxious in regard to list 89 "as the lands adjoin the oil territory and Mr. Kruttschnitt is very solicitous in regard to it". This letter is set out on pages 1577, 1578, 1579 and 1580 of the record. It was written a year and two days before the date of the assailed patent and its contents demonstrate that both Eberlein and Kruttschnitt believed in the oil character of the lands thus sought to be secured by appellants as agricultural lands, when in truth and in fact they were and Kruttschnitt and Eberlein verily believed them to be oil lands. The taking of testimony in this case began April 16, 1912, and consumed more than a year, ending in December, 1913. As early as July, 1912, the letter now under review was demanded by the government under *subpoena duces tecum*, but it was not produced until August 2, 1913, several months after Mr. Kruttschnitt was on the stand as a witness for appellants. In July, 1912, Mr. A. A. Hoehling, Jr., who had succeeded D. A. Chambers, then deceased, as the local attorney of appellants in Washington, D. C., was placed under subpoena to produce all the correspondence between Chambers and officials of the railroad company relating to the selection of these lands which were then in Hoehling's custody (R. 1463). Prior to that time

Mr. Hochling had not appeared as an attorney in this case; but on July 30, 1912, on motion of Mr. Charles R. Lewers, Mr. Hochling was entered as attorney for appellants other than the Equitable Trust Company of New York (R. 1339-40). This was while evidence was being taken in the city of Washington and the record will show that Mr. Hochling attended as counsel the hearings in that city. On August 2, 1913, it is shown on page 1478 of the record that this letter of December 10, 1903, was the subject of a colloquy between counsel for the government and counsel for appellants, Mr. Hochling stating that he had turned that letter over to Mr. Lewers and that Mr. Lewers afterwards advised him that he had sent the letter out to San Francisco. This statement was made in the presence of Mr. Lewers and was not denied by him; so that it thus appears that a letter which one of counsel for appellants was under subpoena to produce was delivered to another of appellants' counsel and mailed by him to a city three thousand miles distant from that in which testimony was being taken and which the other of counsel was under subpoena to produce. (The following facts do not appear in the transcript of the record in this case, but they do appear in the original record as taken by the special examiner and it is the purpose of the government to ask counsel for appellants to stipulate that they be considered as in the transcript. On page 2871 of the original record it appears that on December 4, 1912, counsel for the government again demanded the production of this letter from Eberlein to Cham-

bers of December 10, 1903, and that Mr. Chas. R. Lewers, counsel for appellants, stated that he had not seen the letter since August 2, 1912. Pages 6286 and 6287 of the original record show that on April 7, 1913, immediately before Mr. Kruttschnitt took the stand as a witness in behalf of appellants, counsel for the government called upon counsel for appellants to produce the letter in question which had been delivered to him in Washington in August, 1912, by Hoehling and which counsel for appellants had promised to produce; so that at the very time when it was desirable to examine Mr. Kruttschnitt concerning the reference in the letter to him it was withheld. Pages 6611 and 6616 of the original record show that this demand was again repeated on June 2, 1913.) As a matter of fact the letter was not produced until August 2, 1913, a full year after the time when its production was required by *subpoena duces tecum* upon Mr. Hoehling who, instead of producing it, delivered it to Mr. Charles R. Lewers who in turn mailed it from Washington to San Francisco and did not produce it until August 2, 1913. The record of its production is noted on page 1676 of the record where the date of the production is stated as August 2, 1912. This will be conceded by appellants to be an error and that the date should be 1913 and, apart from concession, this sufficiently appears from reading the first three lines of page 1577 of the record where counsel for appellants is noted as saying:

“This is offered at this time because of the fact that it is a part of the correspondence which



was introduced in evidence at Washington in August of *last year*."

The letter of December 10, 1903, whose production required so much of time and caused so much of trouble and pains and effort, was written by Eberlein a month after he had filed the first selection list in this case and two or three months after Mr. Dumble, according to George A. Stone, went into Eberlein's office and, in the presence of Stone, pressed the selection of the lands in suit. The following is the letter in full:

"(6-15-03-2M)                      Ansd Dec 16                      SC 19 B

"LAND DEPARTMENT OF THE  
"SOUTHERN PACIFIC RAILROAD COMPANY.

"San Francisco, Cal.

"December 10, 1903.

"Subject: Visalia Main Line Indemnity  
List No. 89.

"Mr. D. A. Chambers,

"McGill Building, 908 G St., N. W.,

"Washington, D. C.

"Dear Sir:

"Referring to our correspondence in regard to this matter, I beg to say that under date of December 9th, Mr. Wm. F. Herrin advises me that *he* has taken an appeal from the Register and Receiver's rejection of Main Line Indemnity List No. 89, recently filed, and that a copy of his appeal has been forwarded to you.

"In this letter, evidently written by Mr. Singer, occasion is taken to criticise somewhat the proceeding of this department. The following appears in his letter:

“ ‘The best course, it seems to me, was to accompany the selection list with affidavits setting forth that the lands are vacant and unappropriated non-mineral lands, and asking that the order of suspension be released. Such affidavits and petition would, I believe, have procured a hearing to be ordered, and if sustained should entitle our list to *nunc protunc* filing but if not, still our list would be ordered filed simultaneously with the release of suspension; and pendency of our selection would cut off intermediate settlement.’

“It is possible that Mr. Herrin has written you in the same tenor, when sending you copy of the appeal.

“This is a matter of practice, as to which I am willing to act under advice.

“It seems to me, however, that the first and most necessary step to take was to file our list, as advised by you.

“We, of course, knew of the suspension, and if there is any virtue in the filing of an affidavit I don’t see why it cannot be done now as well as at the time of the filing of the list. Will you give me the benefit of your advice as to what is best to be done?

“I am particularly anxious in regard to this list as the lands adjoin the oil territory, and Mr. Kruttschnitt is very solicitous in regard to it.

“I have had in mind the suggestion you made sometime ago in regard to inducing Mr. E. C. Ryan, special agent at Los Angeles, to make his report.

“I am not acquainted with Mr. Ryan, and it is a matter for serious consideration as how to approach him. It would not do, certainly, to

ask for a report recommending the release of the lands selected by us, from suspension. In my opinion it would not be politic to ask for a release in any particular district. Mr. Ryan would, in all probability, jump at the conclusion that the railroad had some special information in regard to that district, and the result would probably be that our request would have the opposite effect from that desired.

"All that I could do would be in a general way to ask him to submit a report of the lands covered by the order of suspension, which, as you know, embraces a very large area.

"How would it do to ask the Department to suggest to Mr. Ryan that he make a report of so much of the lands within the suspension limits as he has examined up to this time? It might be that such a report would cover the very district in which we are operating, and we would then be relieved from the danger of having called particular attention to any locality.

"There is a point of land office practice as to which I would like your opinion.

"Since succeeding Mr. Madden two lists have been filed by this department and rejected. In both cases, following out what appears to have been the rule in this department heretofore, I have written to the Law Department, stating the facts of filing, rejection, etc., and asked that a proper appeal be drawn and sent to me for execution and filing. In both cases the Law Department has not only drawn but has perfected the appeal and filed it without reference to this department. I do not know that there is any point involved, and the only reason that I am asking for your opinion is that heretofore I find, by reference to our office files, the appeal has been drawn in the Law Department and signed by the Land Agent, and by him for-

warded to the Register and Receiver for filing. It is merely a question of what is the proper procedure.

“I presume the General Land Office has its own ideas as to what officer should make the appeal, and I do not wish to vary the practice in such a matter as to confuse the Department, and hereafter lead to complications which might be very annoying.

“Yours very truly,

“Charles W. Eberlein,  
“Acting Land Agent.”

(Exhibit 199, R. 1577-78-79-80.)

The W. F. Herrin referred to in the first paragraph of the letter appears elsewhere in the record as the general counsel for the Southern Pacific Company and Chairman of the Executive Committee of the Associated Oil Company, one of its subsidiaries.

Attention is again directed to the pregnant meaning of the following paragraph:

“I am particularly anxious in regard to this list as the lands adjoin the oil territory and Mr. Kruttschnitt is very solicitous in regard to it.”

This excerpt would be a sufficient explanation of the fact that counsel for appellants withheld for an entire year the production of the letter. It evidences Mr. Eberlein's anxiety and Mr. Kruttschnitt's solicitude and demonstrates that the anxiety of the one and the solicitude of the other arose out of the fact that the “lands adjoin the oil territory”. The



circumstance that the lands adjoined the oil territory was a sufficient explanation and evidently Eberlein thought that a word to a wise man like Chambers was sufficient. One cannot read this sentence without concluding that Eberlein himself believed the lands to be oil lands or escape the conviction that he spoke authoritatively when he attributed to Mr. Kruttschnitt solicitude and predicated that solicitude on the fact that the lands adjoin the oil territory. And these are the lands whose selection was pressed by Dumble. These are the lands examined by Owen, Dumble's associate geologist, as shown by Exhibit 157 and the report or letter of March 25, 1903, and Treadwell's map, Exhibit 115, all of them in the possession of Dumble at the time when Stone says he pressed their selection. It will later appear that Judge W. D. Cornish, vice-president of the Southern Pacific Company and president of the Southern Pacific Railroad Company, was also advertent to the proximity of the selected lands to the oil territory and the import thereof.

It is not out of place here to note the fact that counsel for appellants, in his cross-examination of Mr. Kruttschnitt, evidently had in mind the language of the quoted sentence, as shown by reference to page 3094 of the record where Mr. Kruttschnitt, while the letter in question was in the possession of counsel for appellants and many months before it was produced, disclaimed that he was *solicitous* about obtaining patent to the lands in suit, thus entering in advance of the production of the letter a denial

of the state of mind attributed to him by his subordinate; but the fact remains that the record of Mr. Kruttschnitt's state of mind made by his subordinate was contemporary with the events under review, while Mr. Kruttschnitt's testimony was matter of memory of those events eight years after they had transpired. No conceivable motive can be attributed to Eberlein for representing in 1903 that Mr. Kruttschnitt was solicitous and it is evident that he wrote what he understood to be the truth. Certainly his contemporary declaration, made when there was no motive to do other than speak the truth, stands on a higher plane of credibility than the denial of Mr. Kruttschnitt eight years later when all of the circumstances combined to influence and prompt a contradiction.

It has already been shown that the selection was rejected by the Register and Receiver because of the outstanding suspension of February 28, 1900, and that Chambers had requested that a special agent be instructed by the Commissioner to make an investigation and report. In the letter of December 10, 1903, Eberlein, having in mind the suggestion made by Chambers in regard to inducing Ryan to make his report, replied that he was not acquainted with Ryan and that it was a matter for serious consideration as to how to approach him; that it would certainly not do to ask for a report recommending the release of the lands in suit and that in his opinion it would not be politic to ask for a release in any particular district, because Ryan would in all

probability jump at the conclusion that the railroad had some special information in regard to that district. These are Eberlein's very words: "jump at the conclusion that the railroad had some special information in regard to that district". It is pertinent to inquire why he entertained such a fear unless there was basis for it. Eberlein then proceeds to suggest that it might be well to ask the department to suggest to Ryan that he make a report of so much of the lands within the suspension limits as he had examined up to that time, since such a report might over the very district involved and would thereby relieve them from the danger of having called particular attention to any locality. Could one employ plainer language to impart guilty knowledge and fear of danger? What danger could there be unless there was an effort to do that which was unlawful and wrongful? It is manifest that both Eberlein and Chambers recognized the peril in which they and the selection list would be placed if Ryan's attention were directed to the lands in suit and Eberlein must manifestly have felt that such action would bring about a result opposite in effect to that desired.

Ryan made his first report on January 22, 1904, recommending that the lands in suit be relieved from suspension. At the date of this report the appeal taken by the railroad company was still pending in the General Land Office, but on receipt of Ryan's report the order of suspension was revoked February 20, 1904, as to the lands in suit by order of

the Commissioner sent to and received by the Register and Receiver at Visalia February 26, 1904 (R. 3758). The railroad thereupon abandoned its appeal. Previously, on December 16, 1903, W. F. Herrin, chief counsel of the Southern Pacific and Southern Pacific Railroad companies (R. 1348), who had taken an appeal in behalf of the railroad company, had been notified by Chambers that the lands in suit had been suspended in 1900 because of allegations that they contained oil, but that he was endeavoring to have the order revoked and on November 30 had requested the Commissioner to direct a special agent to examine and report on them and had been advised that this was done. The letter from Chambers to Herrin follows:

“Visalia Main Line Indemnity List No. 89,  
Lands in Tp. 30 S., R. 23 E., MDM.

“December 16, 1903.

“Hon. W. F. Herrin,  
“San Francisco, Cal.

“Dear Sir:—

“I have your letter of the 9th instant, with copy of an appeal taken on behalf of the Southern Pacific Railroad Company from the rejection by the Register & Receiver of the above list, on the ground that the lands were suspended from disposition by Commissioner’s telegram of February 28, 1900.

“The Register & Receiver in rejecting said list conformed to the rulings of the Department in like cases.

“This blanket suspension of February 28, 1900, on allegations that a large area of land in California contained petroleum, we endeavored



to have the late Commissioner Hermann revoke, but the best he would do was to direct his special agents to examine and report on all lands within railroad limits in Southern California. We have never been able to learn that any report was ever made by special agents.

"As to the lands on this list 89, on the 30th ult., I requested the Commissioner to have an investigation of them made immediately by a Special agent, and on the 10th inst., he advised me that a special agent had been instructed to examine and report on them. On the same day I advised Mr. Eberlein of said action of the Commissioner.

"It did not seem advisable to me that the company at this time should take steps to get a hearing as to these lands, for if the special agent reports favorably, the lands would be released from suspension without expense to the company, and if, as to any of the lands, his report shall be adverse, it will then be time enough for us to apply for a hearing as to such lands with submission of affidavits in support of our application.

"I will look after this appeal when received at the General Land Office from the Visalia local office.

"Yours truly,

(Signed) "D. A. Chambers."

(R. 1483-84)

It is to be noted that Chambers, Washington counsel of appellants, did not think it "advisable that the company at this time should take steps to get a hearing as to these lands". On the same date,

December 16, 1903, Chambers wrote a letter to Eberlein in which he warned him, if he met Ryan, to merely say that it would be acceptable to the company if Ryan would make a speedy report (R. 1484-5)—a warning in line with fears expressed in a previous letter from Eberlein to Chambers, already noted, to the evident effect that Ryan might discover the ulterior motive that underlaid their desire to secure these lands.

January 13, 1904, Chambers again wrote Eberlein a letter in which he referred to the latter's letter to him of January 6 in which he was taken to task for calling the attention of the Commissioner specifically to the lands in suit; for Chambers says:

“I received your letter of the 6th instant, in which you say that my action in respect to the lands in the above list 89 has not been in accordance with your suggestion in your letter of the 10th ult.”

It is evident that this was the letter in which Eberlein, fearing that to do so would result in the discovery by the Commissioner of the real reason for which they were desired, warned Chambers not to ask for a special report upon the lands in suit. Chambers continues: “Please bear in mind that these two requests for the examination of specified lands by a special agent were made and the action of the Commissioner taken before I received your letter of December 10 to which you now call attention. Since the receipt of your letter of the tenth of December I have not made and shall not make

any request for examination by a special agent of any of the suspended lands within the grant of the railroad company, unless you so request." (R. 1487.)

Further along he writes: "If I had known your views when writing my letter of October 7 and November 30 to the Commissioner, I could have made said letters conform thereto and asked action upon all suspended lands without specification of any. But the Commissioner's letter of December 10 to special agent Ryan which, *confidentially*, I have been allowed to read, suggests that he now report whether there is any necessity for the continuance of the suspension of any land in three districts; and this is apparently the kind of official action that you desire." (R. 1488.)

It has already been pointed out that Mr. Hoehling was subpoenaed to produce all the correspondence between Chambers and Eberlein and it is significant that this letter of January 6, referred to in the foregoing letter, in which Eberlein evidently chided Chambers for his indiscretion in directing the attention of the Commissioner to the lands in suit, was not produced.

Because section 29 of the lands in suit was inadvertently omitted in the order revoking the suspension of the lands from disposition, the Commissioner decided to relieve it also and that fact was reported to Eberlein by Chambers on February 13, 1904 (R. 1490-1).

By letter of March 8, 1904, Eberlein called Chambers' attention to some error in selection list 89 of the lands in suit. This letter was not produced by appellants and is not in the record, but it is clear from Chambers' letter to Eberlein of March 15, 1904 (R. 1495), which is in terms a reply thereto, that Eberlein again urged prompt attention to the patenting of the list. In this reply Chambers promised that he would give due attention to the patenting of the list, but that he could not make any progress with it until the May returns from the Visalia office had been received; and Chambers advised Eberlein not to submit a new list because of the great amount of trouble which they had had with the pending list (R. 1497). This letter was written seven days subsequent to a personal visit made by Eberlein to Chambers in Washington, as is shown by the fact that a telegram from Eberlein to Stone of March 8, 1904, was produced from the letter-press of D. A. Chambers by his successor, Mr. Hoehling (R. 1492-3). It could not have been in Chambers' letter-press unless it was sent from his office by Eberlein. That document is as follows:

"Telegram:

"March 8, 1904.

"George A. Stone,

"Land Department Southern  
Pacific R. R.,

"Wells Fargo Express Bldg.,

"San Francisco, Cal.

"Referring to your letter February 29th to Mr. Chambers regarding Visalia Indemnity List



eighty-nine: Do not wait on motion of Register and Receiver at Visalia, but take active steps to have list eighty-nine approved as directed by Commissioner's letter. Notify Mr. Chambers by wire and by letter of date of approval of Register and Receiver and date when they returned the list to the Commissioner. Act promptly.

(Signed) "Charles W. Eberlein."

"D.H. 2083

(R. 1493.)

This brings the record down to March 22, 1904, when special agent Ryan submitted an additional report involving all of the lands which he had been originally instructed to investigate, 45 townships including the lands in suit, in which report he recommended that all lands on which there were no oil wells producing oil in paying quantities be relieved from suspension (R. 1560-1-2-3-4-5-6-7).

Thereafter the railroad company through its land agent on June 20, 1904, again submitted a false and fraudulent affidavit in support of its application for selection of the lands in suit (R. 1572-3). This affidavit was tendered with a new selection of the same lands (R. 1572-3) and it was made after the Register and Receiver had required publication of the list because within six miles of mining claims (R. 3776-7). Following is the affidavit:

"City and County of San Francisco—ss.

"State of California,

"Charles W. Eberlein, being duly sworn deposes and says that he is the acting land agent

of the Southern Pacific Railroad Company, that the lands selected by the Southern Pacific Railroad Company for patent in its Visalia Indemnity Limits List No. 89 have been carefully examined by the agents and employees of said Company as to their mineral or agricultural character, and that, to the best of his knowledge and belief, none of the lands returned in said List No. 89 are mineral lands.

(R. 1572-3.)

(Signed) "Charles W. Eberlein.

The new list No. 89 of June 20, 1904, was forwarded by the Register and Receiver to the General Land Office on July 14, 1904, and received at the General Land Office July 20, 1904 (R. 1572-3; 3776-7).

It has already been shown herein in connection with the History of List 89, at pages 5 *et seq.* of this brief, that a third list was filed September 6, 1904, because of failure of the former list to conform to the regulations of the General Land Office in the matter of assignment of base lands. Accordingly, on August 31, 1904 (R. 3850-1), another non-mineral affidavit was made and sworn to by Eberlein as acting land agent and, accompanying the new and revised list, was filed with the Register and Receiver on September 6, 1904 (Exhibit 12-R; R. 3772). The affidavit in question follows:

"(10-22-03-100) Form 3304.

"State of California,

"City and County of San Francisco—ss.

"Charles W. Eberlein being duly sworn deposes and says that he is the acting land agent

of the Southern Pacific Railroad Company, that he has caused the lands selected in said Company's List No. 89 to be carefully examined by the agents and employees of said company as to their mineral or agricultural character, and that to the best of his knowledge and belief, none of the lands returned in said list are mineral lands.

(Ink handwriting) "Charles W. Eberlein.

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**The Kern Trading and Oil Company lease.**

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The evidence now to be reviewed will show that on August 2, 1904, a lease transferring to the Kern Trading and Oil Company, organized as the fuel department of the Southern Pacific Company, 35,600 acres of oil lands including one section in the very township in which the lands in suit are situate and actually adjoining the lands then under selection but not yet patented, was presented to Eberlein for execution in behalf of the Southern Pacific Railroad Company. It was executed in his presence by C. H. Markham (R. 1100) in behalf of the Kern Trading and Oil Company of which he was president, he being also general manager of the Southern Pacific Company. Eberlein at once recognized the anomalous position in which the execution of such a lease for oil purposes would place one who had signed and tendered a non-mineral affidavit in support of a selection of lands adjoined by the lands thus sought to be transferred for oil development purposes. He noticed the signature of E. T. Dumble, the Southern Pacific geologist, endorsed on the lease and certify-

ing to the correctness of the description of the lands described therein (R. 1100). Eberlein stated that Dumble's certification was a surprise to him, since he did not know that Dumble knew anything at all about the grant lands of the Company (R. 1140) and aroused in his mind a suspicion that Dumble had knowledge of the lands which he, Eberlein, did not have (R. 1307-8). This was four months before the patent was issued and while the application was under consideration in the Land Office; and it is evident that the impression that Eberlein meant to produce was that Dumble knew that the lands in suit were oil lands, but that he, Eberlein, did not know it. The fact, however, that this testimony was given by Eberlein a year prior to the production in evidence of his letter of December 10, 1903, to Chambers, the Washington attorney of the Southern Pacific interests, and before Eberlein had any knowledge or suspicion that its contents would ever be disclosed in this suit, is significant. In that letter, it will be recalled, it appears that Eberlein knew the oil character of the lands in suit eight months before the lease in question was tendered for his signature or certainly, at least, that he was particularly *anxious* about them and that Mr. Kruttschnitt was *very solicitous* about them because they adjoined the oil territory.

It would be difficult to conceive why the proximity of lands to oil territory would be the occasion of anxiety or solicitude to secure them unless that proximity imported that the desired lands were of



like character with the oil territory. Accordingly, it may be safely asserted that, while Eberlein sought to convey the impression that Dumble's connection with the Kern Trading and Oil Company lease aroused a suspicion in his mind that Dumble knew something that he, Eberlein, did not know, as a matter of fact it merely added fire to a flame which had been lighted as far back as December 10, 1903.

At the time when on August 31, 1904, Eberlein filed the third and last non-mineral affidavit, he had had in his possession for nearly a month the lease to the Kern Trading & Oil Company, already executed in behalf of the fuel department by Mr. Markham and awaiting signature in behalf of the Southern Pacific Railroad Company. It is evident that Eberlein refused to sign the lease because the lands sought to be conveyed for oil purposes were adjoining and interspersed with the lands then under selection and he was apprehensive lest the execution by him of the lease, at the time when he was swearing to the non-mineral character of the lands in suit, would, if made public, result in the conviction that he had filed a false and fraudulent non-mineral affidavit. Of the large area of oil lands proposed to be thus transferred 25,000 acres were situate adjacent to the lands in suit and stretched along the eastern base of the main chain of mountains from a point northwest of McKittrick as far southeast as Sunset and scattered along which at that time were 281 producing oil wells. Notwithstanding these confessed suspicions of Eberlein,

which subsequently led to a series of letters which will be set out, he on August 31, as already noted, executed the non-mineral affidavit in support of the selection list on which the assailed patent finally issued and tendered it to the Register and Receiver at Visalia who received it on September 6, 1904 (R. 3772).

Co-incident with these events and proceedings in the railroad and local land offices there was a conversation in the field to which Josiah Owen was a party which confirms the charge of fraud. S. P. Wible testified that "just about the time of the selection" Owen told him that, if the railroad company selected the lands in township 30-23, it would be selecting mineral lands which he had reported to it as such (R. 324-5).

This, then, was the situation: Although he had made no examination of the lands in suit, although he himself had caused none to be made by others, although he suspected that Dumble, Southern Pacific geologist, knew something about them that he didn't know, although he was apprised that the lands adjoining and in the immediate vicinity of the lands which he was attempting to select had been included in a lease to an oil development company and although he had been strenuously protesting against such a thing because of the damning character of the evidence which it would create, Eberlein on August 31, nevertheless, again committed himself under oath to the false and fraudulent statements contained in

the last of the three non-mineral affidavits. Great must have been his *particular anxiety* and great must have been Mr. Kruttschnitt's *solicitude* thus to have forced him to assume such risks! Great, too, must have been the prize involved in securing *lands which adjoined the oil territory!*

Alarmed by the attempt of General Manager Markham and his other superior officers to force through this lease with consequent stultification to him, Eberlein on September 3, 1904, addressed a letter to Judge W. D. Cornish, vice-president of the Southern Pacific Company and president of the Southern Pacific Railroad Company, in which he very boldly announced his apprehension of the possible discovery by the United States Land Office of the fraud then in process of perpetration. The letter which was received in due course by Judge Cornish and subsequently became the subject of a confidential and personal conference in New York between the writer and the addressee follows:

“Dictated.

“Personal.

“September 3, 1904.

“Hon. W. D. Cornish,

“Vice-President, Southern Pacific Co.,

“120 Broadway, New York.

“Dear Sir:

“As you are aware, the Kern Trading & Oil Company has been organized.

“I am totally in the dark as to the objects, rights, etc., of this corporation. I have asked for information several times, but it has never been furnished me. *I was told in a*

*general way that this company was organized for the purpose of taking over the oil lands of the Southern Pacific Railroad Company and operating same.* A lease has been made for the term of ten years from the first of January, 1904, with a renewable term of the same period. The lease is made by the Southern Pacific Railroad Company to the Kern Trading & Oil Company and covers all the lands now in the ownership of the company that either *are or are supposed to be oil bearing.* The consideration for this lease is a royalty of one-tenth of the gross product, or, 'one-tenth of the gross amount of moneys received from the sale of said minerals, substances and products'. This lease was concocted without any reference to me, and it has now been sent over for me to execute on behalf of the Southern Pacific Railroad Company.

"I don't know that there is any particular objection to it, as perhaps one-tenth of the product may be fair. The company now receives one-fifth in some cases and in other cases one-eighth, and this is at a still lower rate. However, I do not object to that.

"I am, however, somewhat slow about signing this document and tying the railroad company up for a series of years. Of course, I know that it is for the benefit of the Southern Pacific Company, but there is one feature which seems to me to be important. Inasmuch as the lease is made by the Land Department, and the head of that department is taking the responsibility therefor, it does not seem proper that the Southern Pacific Railroad Company shall have nothing to say in regard to the disposition of its royalty oil. The lease provides that the oil may be sold and the one-tenth of the moneys received be



turned over to the Land Department. It leaves the matter entirely in the management of the Southern Pacific Company, or the Kern Trading & Oil Company, I don't know which. In all events it is possible for some man not connected with the Land Department, nor with the Southern Pacific Railroad Company, to make a price on royalty oil belonging to the railroad company and sell it. There is no provision in the lease that the price to be received, in case the oil is sold, shall be the market price, or any other price. You can see that there is a wide open door for the disposition of the Land Department property at ruinous prices, thus depriving the Land Department and the bond holders of a fair return for their property.

"I feel that it is incumbent upon me to look somewhat into this instrument and into the future. I know that it is hardly probable but still it is possible that the control of this oil company may by some contingency pass out of the present hands, and if it should fall into hostile control the railroad company would get very much the worst of it.

"As I have already stated, this matter has been hatched for my signature without submission to me or without consultation. I know the answer, in case the question was raised, would be that it is all a family matter and that I need not concern myself about it.

"However, I take it that you are somewhat interested in this matter, and I want your advice as to what you think would better be done to protect us against future complications. Do you think it would be wise and expedient and would it serve the purpose of protection if I were to demand action of the Board of Directors of the Southern Pacific Railroad Company

ratifying and confirming the lease as it stands and directing the land agent to sign the lease?

“It seems to me that some such action is not only desirable but necessary, inasmuch as it conveys control of the most valuable lands in the grant for a long term of years.

“This lease has been lying here for some time during my absence and I may be called upon for it at any time. I would therefore esteem it a great favor if you would give me any suggestions you may have by wire.

“I can stave off the delivery of this document for some time yet, I think, for the reason that *if the knowledge of this lease became public property it will probably cause us a great deal of trouble in the United States Land Office, and may result in the loss of a large body of adjacent lands which may hereafter turn out to be mineral and oil bearing.*

“I found on taking charge of this office that a large body of our lands, especially Indemnity lands in the Coalinga, McKittrick and Sunset fields, had been withdrawn by the United States from entry, pending examination as to their mineral character.

“I have worked very hard and very steadily to get the United States to complete its report and dispose of this matter. I have just succeeded in getting the special agent in charge to make a report releasing our land from interdictment.

*“If it becomes known that we have executed a lease of lands interspersed with those already under selection by us, and that the lease is for oil purposes, it seems to me that it will immediately encourage oil speculators to file upon the lands so selected and that the government will have good ground for refusing patent, inas-*

*much as we have practically fixed the mineral status of the land by this lease.*

"Yours very truly,

(Signed) "Charles W. Eberlein,

JRH

"Acting Land Agent."

(R. 1075-6-7-8-9.)

The reading of the foregoing letter written September 3, 1904, while selection list 89 was pending before the United States Land Office, can leave no basis for doubt that Eberlein, who wrote the letter, and Judge Cornish, the very head of land affairs, who received it, appreciated exactly what the real situation was. What possibly, other than that he understood the purpose of the selection and the character of the lands, could Eberlein have meant in saying: "*If the knowledge of this lease became public property it will probably cause us a great deal of trouble in the United States Land Office and may result in the loss of a large body of adjacent lands which may hereafter turn out to be mineral and oil-bearing?*" When testifying as a witness, Eberlein freely admitted that this language undoubtedly referred to the lands then under selection and now in suit. The significance of this letter is accentuated by the fact that it is one of a series of letters and documents which Eberlein was compelled by the government to produce under *subpoena duces tecum*, these letters and documents having been kept by him apart from the general files for the protection of himself and Judge Cornish, as already shown. It has also been shown that Judge Cornish, to whom

the letter was addressed, was Eberlein's chief in land matters, a fact also shown by the testimony of Mr. Kruttschnitt already set out that, when Stone's threatening letter was received by him, he referred it to Judge Cornish who was the head of land affairs.

In addition to the letter in question and others to follow, Eberlein had frequent conversations with Judge Cornish and C. H. Markham in which he protested and pointed out the effect which would be produced in the United States Land Office by the activity of Mr. Dumble and his geologists in the examination of unpatented lands; and this occurred at the very time when the lease was under consideration (R. 1091-2). In the case of Cosmos Exploration Company vs. Gray Eagle Oil Company, *supra*, Judge Ross declared that if the parties, instead of filing the non-mineral affidavit, had represented to the local land officers that they at least believed the lands there in suit to be oil lands, it could not be doubted that their selection would have been promptly rejected. If in the instant case Eberlein, upon whom the responsibility was devolved both by the law which required that the non-mineral affidavit be executed by the land agent and by the resolution of the board of directors of the Southern Pacific Railroad Company appointing him acting land agent, had, upon being apprised of the purpose to convey lands adjoining the lands in suit to an oil development company, made that fact known to the United States Land Officers instead of recklessly and falsely representing to them that he had caused an examination of the lands to be made and that



they were non-mineral in character, can it be doubted that the selection list would have been rejected and the assailed patent would never have issued and the institution of this suit would not have been a necessity?

What he in effect said was: "I swear that these lands are non-mineral", in saying which he manifestly did not speak the truth. Giving him the benefit of every doubt and assuming that, when the first non-mineral affidavit was made, he knew nothing whatever about the character of the lands in suit, yet, when he did learn of facts which put him on notice, having put his hand to the plow he would not turn back—having started out to secure patent to the lands in suit and having sworn that they were non-mineral, he shows both by his correspondence and his testimony that his purpose was to carry the enterprise through to the end notwithstanding any knowledge that might come to him.

It is manifest that, when he initiated the proceedings intended to eventuate in patent to the lands in suit, Eberlein was bent upon the success of his effort regardless of the real character of the selected lands and, as in the Diamond Coal & Coke Company case, "without care as to the means". This is clearly shown by the fact that he falsely swore that he had caused an examination of the lands to be made for the purpose of determining their character when in truth he had not done so. He testified as a witness that he knew nothing of them and yet

as acting land agent he swore that they were non-mineral. However this may be and while it is by no means conceded that he had no guilty knowledge at the time of filing the first non-mineral affidavit, yet, on the other hand, if for purposes of argument it were admitted that he was ignorant at that time of their true character, it is manifest that on September 3, 1904, when he wrote his "personal" letter to the chief, Judge Cornish, he realized the mineral character of the lands in suit and stated in the concluding paragraph thereof that the fact of the execution of the lease to the Kern Trading & Oil Company and what it imported constituted "*good grounds for refusing patent inasmuch as we practically fix the mineral status of the land*". It is manifest that, since there were "good grounds for refusing patent", he was under the solemn duty of making those grounds known to the United States to whose officers he had sworn in effect that there were not good grounds for refusing patent. The only "good grounds for refusing patent" would be the mineral character of the lands, since such were the only lands excepted from the operation of the granting act; and the sole question involved in the application for patent was the character of the lands. In this connection attention is again invited to the resolution of the board of directors of the Southern Pacific Railroad Company appointing Eberlein acting land agent by which he was "fully authorized and empowered to represent this company in the United States Land offices or before the officers thereof" (R. 1038-9). There can remain

no doubt that on September 3, 1904, three months before the patent issued, Eberlein had notice and knowledge of the mineral character of the lands in suit and that his notice and his knowledge constituted notice and knowledge to the Southern Pacific Railroad Company and that every act done by him in support of the selection of the lands in suit was, by reason of the resolution in question, the act of appellants. Two days after mailing the foregoing letter to his chief in New York Eberlein transmitted the third and last non-mineral affidavit to the Register and Receiver at Visalia. If, instead of transmitting a false oath as to the character of the lands in suit, he had made known to the Register and Receiver what he had made known to Judge Cornish, the assailed patent would never have issued and the government would never have been under the necessity of instituting this suit; and appellants will hardly suggest that Eberlein had the right to withhold from the United States any information which he received during the pendency of the proceedings which resulted in patent. The legal effect of withholding material information concerning the true character of lands sought to be patented is the same as offering false evidence. Eberlein did both.

Although in the foregoing letter Eberlein had stated that he would esteem it a great favor if Judge Cornish would give him any suggestion he might have by wire (R. 1078), he received no answer either by way of letter or telegram (R. 1242). Judge Cornish "never would go on record about anything

by letter if he could possibly avoid it" and, as a consequence, Eberlein said that he spent a great part of his time running back and forth between San Francisco and New York, spending half of his time in the latter place (R. 1243). Consequently Eberlein went to New York late in the Fall or early in the Winter of 1904 and held a conference with Judge Cornish about the subject matter of the letter in question (R. 1125-6). It is best to let that conference be related in the words of Eberlein himself and accordingly the questions and answers from the transcript are here given:

"Q. Now, will you relate, as nearly as you can recollect, what the substance of the conversation was with Mr. Cornish with respect to what I have read from that letter, Mr. Eberlein? Before entering upon that, may I ask you whether you took with you at that time this attempted lease which has been introduced in evidence and such correspondence as has also been introduced?

"A. Yes sir.

"Q. Saved by you from the conflagration of 1906?

"A. Yes sir. This matter was taken up by Judge Cornish and myself and discussed at that time.

"Q. Did you talk over that phase of the letter, specifically, which reads as follows: 'If it becomes known that we have executed a lease of lands interspersed with those already under selection by us and that the lease is for oil purposes it seems to me that it will immediately encourage oil speculators to file upon the lands so selected and that the government will have



good ground for refusing patent, inasmuch as we practically fix the mineral status of the land by this lease.'

"A. Yes; we discussed all phases of the matter and agreed as to the impropriety of a lease at that time.

"Q. The lands referred to by you in that letter, I believe you stated once were the lands in suit in township 30 South, Range 23 East, Mount Diablo Meridian?

"A. I understand now the lands in suit are the lands covered by that selection list 89?

"Q. Yes sir.

"A. Yes sir.

"Q. And those were the specific lands to which you referred in your letter and in your conversation which occurred with Mr. Cornish?

"A. Must have been.

"Q. Now, state, as nearly as you can recollect, what conversation you had with Mr. Cornish about the execution of that lease?

"A. We took this matter up with all the papers; looked them through, and I asked him what he wanted done with them and he was very positive in his instruction that I was not to sign it or to recognize it. He considered it an improper lease to be made, having reference to the selection list of lands in the immediate neighborhood. He furthermore told me that I was to keep all those papers in my own possession, so that they might not be in the office where they might be considered as going where anyone would have any knowledge of the document, so that it could not be acted upon in some way during my absence; that is, he particularly cautioned me against the approval of those

vouchers which were beginning to come in at that time for pipage.

“Q. Well, did he, at that time, instruct you positively to keep the papers which have been introduced, constituting the correspondence between yourself and other officials of these roads, and have them filed separately from the other files of the Land Department of the Southern Pacific Railroad Company?

“A. His instruction was that I was to keep those to myself. He said they might hereafter be necessary for my protection. They have been kept by me ever since—and incidentally for his own protection.

“Q. Did you and Mr. Cornish at that time recognize any trouble which might arise in the future from the making up there of those documents?

“A. We naturally recognized at least the very ambiguous position in which we would be placed, both of us, by that lease, if that lease were made—and especially if I made the lease, I having also made the selection list which was at that time unapproved.

“Q. That is, it had not gone to patent?

“A. It had not gone to patent. It had been approved but not patented.

“Q. And in support of that selection list referred to by you which has been introduced in evidence, you had made the usual non-mineral affidavit, testifying under oath that the lands, so far as you knew, were non-mineral in character?

“A. Yes sir.

“Q. Now, did the fact that you had made that non-mineral affidavit and the further fact

that the lands were in process of administration in the Land Department of the United States, and no patent having issued, give you notice of the trouble which would ensue if you executed that lease?

"A. I don't know as I understand that question exactly; but I simply state, as I have already stated, that the fact that I had made a non-mineral affidavit covering a large selection list, in perfect good faith, believing the fact to be as set forth in that non-mineral affidavit, it didn't seem good policy, to say the least, for me to turn around and make a lease of lands which were in juxtaposition to these same lands, and I believed, and Judge Cornish believed thoroughly, that it might give rise to trouble.

"Q. Now, what trouble would you expect from that and what trouble did you have in mind?

"A. Naturally would expect that if the lease was made at that time, with those lands mixed up as they were, or adjacent, that the government of the United States, having in mind that they were very active about that time in nosing into everything that affected railroad lands, would be very apt to call that lease at least in question and make effort, at least—or hold it up or entirely knock it out.

"Q. In other words, to completely preclude the possibility of the Southern Pacific Railroad Company acquiring title under that list?

"A. Yes, very probably would."

It has already been related that in the Fall of 1907 Eberlein met Judge Cornish in the latter's private car leaving Ogden and that at that time Judge Cornish, being under the impression that the

papers and correspondence relating to this fraud had been destroyed in the San Francisco fire of 1906, told Eberlein that he had destroyed his file of that correspondence. For some reason which does not appear Eberlein did not at that time inform Judge Cornish that this incriminating correspondence had been saved from the fire and Judge Cornish died in the belief that none of these papers had survived the flames.

September 10, 1904, seven days after the date of his famous letter to Judge Cornish and a little more than a month after C. H. Markham, general manager of the Southern Pacific Company and second vice-president of the Southern Pacific Railroad Company, had presented the proposed lease to the Kern Trading & Oil Company to Eberlein for his signature, Eberlein, the lease being still unexecuted by him, addressed a letter to Mr. Markham in which he warned him that he had selected in behalf of the railroad the lands now in suit and had represented them to be non-mineral in character (R. 1053-4-5-6). This letter, so far as it is here pertinent, reads as follows:

“In addition to this there is a very urgent reason for delaying the execution of these papers. We have selected a large body of lands interspersed with the lands sought to be conveyed by this lease and which we have represented as non-mineral in character. *Should the existence of this lease become known it would go a long way toward establishing the mineral character of the lands referred to and which are still unpatented*” (R. 1055-6).



This letter is a contemporaneous record made by Eberlein himself at the very time when he was swearing to the non-mineral character of the lands in suit and demonstrates his knowledge of the situation and of the real character of the lands in suit.

It will be remembered that throughout this time and for years subsequent Professor Dumble, the Southern Pacific geologist, was frequently "butting in", as Eberlein expressed it, on lands within the Southern Pacific Railroad Company's grant which were still unpatented (R. 1043). Dumble kept up this practice of making geological examinations of unpatented lands within the grant to the Southern Pacific Railroad Company—a custom established by Treadwell several years previously (R. 3471)—his only conceivable purpose being to determine their mineral character, over the continuous objection of Eberlein until it resulted in a vigorous letter written by Eberlein on February 22, 1908, to Henry Conlin, his assistant land agent. This letter reads as follows:

"Feb. 22, 1908.

"Mr. Conlin:

"The New York office has forbidden the giving out of any more printed lists of lands because of the unsatisfactory condition of our titles which must not be disclosed. The examination of our S. P. lands not yet patented by our oil experts must be stopped as information that they may obtain or give as to mineral character prior to patent will forever prevent our getting title. Should Mr. Calvin call for any lists please take this memo. to him and explain our situation and refer him direct to the New

York office. Please advise him too of the pressing necessity of the return of lists sent in a year ago for entry of lands to be reserved for company purposes. Mr. Dumble and his men should not be furnished by us with any data whatever except as to *patented* lands. For reasons above given such information will be embarrassing to them and us and may make them witnesses against this company in mineral contests hereafter.

(Signed) "Chas. W. Eberlein,  
"Acting Land Agent."

(R. 1904-5.)

The "New York office" reference was to Judge Cornish who, it has been heretofore shown, exercised authority in land matters (R. 1095-6). Eberlein explained that Dumble's examination of unpatented lands was at the date of the letter a continuation of conduct begun in 1903 and that the letter was a continuation of his, Eberlein's, repeated protests (R. 1097-8). He had protested to Judge Cornish, as also to Mr. Markham, to whom prior to patent he had pointed out that "people acting without any kind of knowledge of what they were doing, without any reference to the selection list of the company, without any reference to whether the lands were patented or even surveyed—that it would charge the company with notice". He claimed that it did not charge him with notice, "*but it certainly would be the grounds on which to get in and protest the patents or protest the lists and so the fact turned out to be*" (R. 1092-3). It thus appears that in 1904 Eberlein foresaw the

trouble that was in store and made a prediction which had its fulfillment in the institution of this suit.

After the lease had been submitted to him on August 2, 1904, Eberlein left for Denver (R. 1191) and on August 4 wired his assistant, George A. Stone, that no land would be for sale at any price and instructed him to hold the lease until his return (R. 1048). On August 5 Stone informed Markham that Eberlein had gone to Denver and would take up the matter of the lease immediately upon his return (R. 1049). September 5, 1904, Markham wrote Eberlein acknowledging receipt of Stone's letter of August 5 and asking when he might expect the lease. This resulted in Eberlein's warning of September 10, 1904, the letter already referred to (R. 1053-4-5-6).

September 19, 1904, Dumble wrote Markham a letter in which he returned Eberlein's letter of September 10 to Markham (R. 2950-1). Dumble's letter shows clearly by its references that he had carefully read the letter from Eberlein to Markham and he admitted that it was the letter received by him from Mr. Markham with the latter's letter of September 15, 1904. Whether it was identical with it or not he stated that he could not say "after this length of time" (R. 2951); but he did not remember the most material parts of it, especially the damaging and incriminating portions (R. 2951-2). Dumble's testimony at this point

leads to one of two conclusions: either that his failure of memory was most convenient or that Mr. Markham, in sending him a copy of Eberlein's letter, prudently deleted the incriminating portions, a presumption not easily indulged.

Following the letter of September 10, 1904, from Eberlein to Markham and the continual verbal protests made by the former against Dumble's activities in the examinations of unpatented lands, on October 5, 1904, Dumble requested by letter an interview with Eberlein evidently for the purpose of discussing the bearing of the proposed lease upon the selection list then pending before the Register and Receiver at Visalia. To that letter Eberlein replied:

"October 7th, 1904.

"Mr. E. T. Dumble,  
 "Consulting Geologist  
 "Bldg.

"Dear Sir:

"Referring to your note of Oct. 5th, I beg to say I will be glad to take matters up with you as suggested any time tomorrow that will be convenient to you. I would suggest that you might find it more convenient to come to room 71 where we can have a room to ourselves and not be disturbed. If, however, you prefer I should come to your room, please advise me.

"Yours truly,

(Signed) "Charles W. Eberlein

" "Donaldson" "Acting Land Agent."

"Compared by: H. K.

"L. A.

(R. 1065-6.)



Immediately following this conference Eberlein, through his assistant Stone, on October 8, 1904, forwarded to Dumble "plats showing the status of lands within the Southern Pacific Railroad grant in" certain townships including the township containing the lands here in suit (R. 1067).

Following this conference between Dumble and Eberlein in room 71, the former on December 7, 1904, wrote the following to Mr. W. H. Bancroft, acting general manager of the Southern Pacific Company:

"Southern Pacific Company,  
"San Francisco, Cal., Dec. 7, 1904.

"Mr. W. H. Bancroft,

"Acting Genl. Mgr., City.

"Dear Sir:—

"In connection with our correspondence regarding the transfer of property to the Kern Trading & Oil Company, I have had a conversation with Mr. Eberlein and *it seems for reasons of policy regarding certain unpatented lands that it will be best not to execute the lease of lands between the S. P. R. R. Co., and the K. T. & O. Co., at present.*

"I would, therefore, suggest that the papers covering the transfer of property from the S. P. Co. to K. T. & O. Co., be executed and that the lease of lands in the McKittrick and Coalinga districts from the S. P. R. R. Co. to the K. T. & O. Co. be held up for the present.

"Yours very truly,

"D-R (Signed) "E. T. Dumble."

"CC-C. W. E.

"Compared by: H. K.

"L. A."

(R. 1072-3.)

The notation at the bottom of the letter "CC-CWE" indicates that a carbon copy of that letter was sent to C. W. Eberlein.

In this letter it clearly appears that Dumble had been advised by Eberlein that it would be im-politic, in view of the pendency of selection list 89, to execute the lease to the Kern Trading & Oil Company. The letter points to the falsity of Dumble's testimony denying knowledge of the mineral character of the lands in suit and shows beyond question that he concurred with Eberlein prior to the issuance of patent in the policy of concealing from the United States' land office the truth as to the lands under selection. This is confirmed by another letter of Mr. Dumble dated March 15, 1907, and addressed to Eberlein in which the former reviewed certain facts in connection with the selection of the lands in suit. Eberlein consistently refused to recognize any rights of the Kern Trading & Oil Company in the lands embraced in the proposed lease which he had never executed. He therefore carried things to the extent of denying knowledge regarding the lease, so anxious was he to avoid the stultification which would arise from his course in representing the lands in suit to be non-mineral when he had notice of the purpose to lease lands lying around them for oil development purposes. In 1907 it served Dumble's purpose to attempt to refute Eberlein's denial of knowledge concerning the lands and accordingly he wrote a letter to him in which he called attention to certain

correspondence between various officials of the Southern Pacific Company and the Southern Pacific Railroad Company and among other things reminded Eberlein as follows:

"The matter of differences in the land I took up with you personally and under date of October 8, 1904, you sent me corrected maps showing exactly what lands were to be covered by the lease as drawn. Early in December we had a further conference on the matter and you explained that *you were rushing certain lands for final patent and that the immediate execution of the lease showing our idea of what were oil lands might interfere with you and we agreed to defer the execution until that danger was passed*. On December 7, 1904, I wrote Mr. Bancroft explaining this and suggesting that the lease be held up temporarily, the papers having been approved by all concerned and being in the hands of the management, I considered that I had nothing further to do with them." (R. 2957.)

In this letter, written five years before this suit was brought, Dumble put it on record that he and Eberlein prior to patent discussed the "danger" of the situation and were in agreement that the *proposed lease to the Kern Trading & Oil Company showed Dumble's idea of what were oil lands*; and, when it is remembered that a part of these lands were in the township containing the lands in suit, it is evident that *Dumble shared Eberlein's apprehension that, if the facts were made known to the Land Office, patent would be denied. He was so convinced of this situation that he wrote the acting*

*general manager and suggested that the lease be held up temporarily.*

Reverting for the moment to the conference between Eberlein and Judge Cornish in New York: Eberlein testified that in their conversation they discussed the effect of the Kern Trading and Oil Company lease upon the pending applications. Said Eberlein: "That was the thing that was more interesting to him than anything else. I don't think he bothered himself about these details that I mentioned. I think he thought that was a matter to leave to the gentlemen in charge here. But as to that matter, he was very positive" (R. 1246).

Nothing could more clearly show Eberlein's state of mind than his own testimony as recorded on pages 1249 and 1250 of the record where he said, referring to the Kern Trading & Oil Company lease:

"If what indirect information I had was correct, the lands were to be transferred to an oil development company, and what I refer to here, badly expressed as it is, is my fear that the government would take the very narrowest view possible of the situation and simply say 'here you, the land agent, land officer of the Southern Pacific, are making the lease of these lands lying here to an oil development company and at the same time you have got an application for lands non-mineral lying adjacent'. I simply say that my experience with the Department has always been that it takes very much less than that to make them hold things up and perhaps take things away from you, because a railroad company has very lit-



the chance in its dealings with the United States General Land Office." (R. 1249-50.)

The "what I refer to here badly expressed as it is" relates to the sentence in his letter of September 10, 1904, in which he said: "If it becomes known that we have executed a lease of lands interspersed with those already under selection by us and that the lease is for oil purposes, it seems to me that it will immediately encourage oil speculators to file upon the land so selected and that the government will have good grounds for refusing patent, inasmuch as we practically fix the mineral status of the land by this lease" (R. near top of page 1249).

It is not surprising, then, that, when asked what he meant when he said "inasmuch as we practically fix the mineral status of the land by this lease", he replied: "That is just it. It raises a presumption and what I was afraid of then I think has been fully confirmed now. It does not say, I don't mean to say, or be understood, that these are oil lands or I thought they were oil lands. I merely say the two acts taken together create a presumption which the government would not be slow to take advantage of" (R. 1250).

Is this not tantamount to a confession on the part of Mr. Eberlein of knowledge before patent of the mineral character of the lands in suit?

On the trip to New York to confer with Judge Cornish Eberlein testified that he carried the secret

files of correspondence with him. For a while these papers were kept in his desk and separate from the general files of the land department of the railroad company because of his fear that discovery of them might compromise both himself and his superior officer, Judge Cornish, who was responsible to Mr. Harriman and the board of directors in New York for land affairs (R. 1256). Eberlein's fear that the papers relating to this transaction would become public property led him always to keep them in his individual possession (R. 1261). When asked whether the file remained constantly in his individual possession he replied: "Yes sir, until the day it was *pried out of me* down in Los Angeles" (R. 1272), referring, of course, to the time when under process of court he was compelled to produce the contents of it for purposes of evidence in this suit.

It is evident from the testimony that others, subordinates in the land department of the railroad company, George A. Stone, Charlotte Dorothy Cunningham and perhaps others, were aware of the latent possibilities slumbering in this correspondence and the importance of it upon the consideration of the pending selection list or in a suit thereafter to cancel the patent because of fraud. It was undoubtedly the discernment and calculating intelligence of George A. Stone, who had, as we have seen, had access to these papers at one time, which turned them to profitable account in his threats of exposure resulting in his pensioning.

It is natural that Eberlein should seek to justify his own actions; and it is perfectly plain that it was his policy to appear to know as little as possible about the lands of the Southern Pacific Railroad Company to which he was endeavoring to secure patent. Referring to his letter of February 22, 1908, to Conlin (R. 1094) he said:

"You remember the last letter introduced in evidence is a protest of mine against Dumble examining unpatented lands without any knowledge of or reference to or cooperation with the land department. I think it is a very reasonable thing for any man charged with the duties that I was charged with—the duty of making a non-tulnural affidavit on the very best information he could obtain, as I did—to have the feeling that some man examined those lands and charged the company with notice, but without charging me with notice. Now, that is as far, I think, as I can go in this matter" (R. 1038).

Again, referring to the same letter, he testified:

"O, yes, it is evident from the letter that that is just what I meant—that I, for instance, might make a selection of lands depending on my examination and a trained geologist might have been over the same ground without my knowledge and, whether I was right or wrong, I felt that, inasmuch as he was connected with the Southern Pacific there might be a chance of a claim that I was charged with notice in some way. I could not be; still the claim might be made. It must be remembered that all the time, at least, that I was in the service, it was the ruling of the Department, as I understood it, that surface indications was all that governed in the matter of the selection of lands." (R. 1316.)

From the foregoing it is obvious that it was Eberlein's policy to appear to know as little as possible of lands to which he was seeking patent. *"The duty of making a non-mineral affidavit on the very best information that he could obtain"* was to him an incentive to complete ignorance instead of an argument for advice and all procurable data. Had he desired "the very best information he could obtain" he might well have turned to Professor Dumble in the conference in room 71 about October 5, 1904, and asked him to tell him the true character of the lands under selection. He said that he suspected Dumble or the geologists of the Southern Pacific Company of knowing things that he did not know. Why, when the opportunity offered, did he not take advantage of it and secure from the head of the geologists of the Southern Pacific Company the information so carefully gathered in their examinations of unpatented lands against which he, Eberlein, had so vigorously and so continuously protested?

This leads to the observation that it seemed to be the policy of the high officials of appellants not to let their right hands know what their left hands did. Eberlein says that he had no connection with and got no information from Dumble and the other geologists. Owen told Wible that he had nothing to do with selections (R. 326). Dumble said the same thing (R. 3084). Treadwell also disclaimed (R. 434).

If there were any mystery in this case, it would



disappear as the light shed by these considerations comes in. The land department and the geological department were separate and distinct. "The Jews have no dealings with the Samaritans." It could not have been mere accident that reports by the geological department never reached the land department. It could not have been mere accident that the geologists of appellants had nothing to do with selections and patents. The reports that they made and the information which they gathered must have had a clearing-house somewhere. All that appears is that it was not in the land department. It is entirely conceivable that such reports and maps would have proven very embarrassing when it came to making selections and applying for patents. Hence the wisdom of keeping the two departments severely separate and this could only have been accomplished by the act of some official or officials of commanding position and, for that matter, of discerning and discriminating intelligence. Even a little knowledge on the part of the land agent might prove a very dangerous thing; and so it was the policy of appellants to foster and nourish his ignorance.

Eberlein had a very good idea of the duty cast upon him by his position and by the law and it was no bad formula by which he expressed it—"the duty of making a non-mineral affidavit on the very best information he could obtain". The trouble lies not with the formula, but with the application of it. With Eberlein "the very best information he could

obtain'' was, tested by the conduct which he as a witness ascribed to himself as land agent, synonymous with neglect of opportunity to learn and the very highest measure of willful ignorance of which he could be guilty. He knew that Dumble and Owen and Anderson were examining unpatented lands within the limits of the railroad grant—perhaps the very lands which he was selecting for patent; and yet, if he is to be believed, he never sought nor received any information which was theirs to impart. The reason of his pose is plain and inheres not so much in Eberlein himself as in the system under which he wrought.

It is true that Eberlein was called and sworn as a witness for the government; but it is manifest that this was *ex necessitate*. His testimony was inevitably influenced by the exigencies of the situation in which he found himself. He was the instrument of appellants through whom the assailed patent was secured. He it was who signed and filed the selection list; he it was who executed and tendered the non-mineral affidavits the falseness of which is so manifest. Called to the witness stand by the government which was seeking to invalidate an instrument secured through his acts and oaths, it is entirely natural that he should strive to justify his conduct and himself. Under these circumstances he could hardly have been expected to go further in the path of admission than he actually went when, referring to his letter of February 22, 1908, to Conlin, in which his protests against exami-

nations of unpatented lands by Dumble and the Southern Pacific geologists reached their culmination, he said:

"You remember the last letter introduced in evidence is a protest of mine against Mr. Dumble's examining unpatented lands without any knowledge of or cooperation with the land department. I think it is a very reasonable thing for any man charged with the duties that I was charged with—the duty of making a non-mineral affidavit on the very best information he could obtain, as I did—to have the feeling that some man examined those lands and charged the company with notice, but without charging me with notice. Now, that is as far, I think, as I can go in the matter." (R. 1308.)

It may be admitted that that is about as far in the matter of a confession as he could have been expected to go. The strange thing, however, is that he did not realize that the duty resting upon him of "making a non-mineral affidavit on the very best information he could obtain" laid him under the necessity, if he had reason to believe or even fear that another had made an examination and ascertained things that he, Eberlein, did not know, of making inquiry of such person to the end that he might qualify himself to discharge his duty according to his own formula. He either did not want to be informed or he did not want to appear to be informed. He did not want to be "charged with notice"; and it is obvious that, for some reason which will be indicated in a moment, he was irrevocably bent upon securing a patent to the lands in suit and bitterly resented and constantly pro-

tested against action on the part of others which would imperil the enterprise. This is illustrated by the objections and protests just referred to, as well as by his refusal to execute the Kern Trading & Oil Company lease when insistently urged to do so by General Manager Markham. He could not plead ignorance of that lease and all that it imported if he signed it—he would stultify himself if he subsequently denied knowledge of an instrument which he himself had executed. He had already filed selection list 89 and the accompanying non-mineral affidavit and, having set his hand to the plow, was unwilling to turn back. His decision was prompt; he declined to be a party to its execution, appealed to his chief in New York, Judge Cornish, segregated and secreted his correspondence with reference to it and thenceforth feigned entire ignorance of the whole affair—an amazing course for an intelligent being to follow, but absolutely necessary, as he thought, to clear his skirts of the guilt implied in persisting in representations to the government of the non-mineral character of lands the while “we practically fix the mineral status of the land by this lease”. (R. 1079.)

If the ostrich is justly called a foolish bird because of the habit ascribed to it of burying its head in the sand and assuming that it cannot be seen, how serious and severe must be the condemnation of a human being who takes refuge behind a screen of feigned ignorance while there exist written memorials of his knowledge! Eberlein, deciding after



conference with Judge Cornish not to execute the lease and following his chief's instructions to remove the correspondence from the general files, goes forward with his proceedings looking to patent of lands "adjoining the oil territory" and assumes to forget that he ever heard of a lease to an *oil developing company* of lands lying around those which he was seeking to acquire. As late as 1907—to be exact, February 6, 1907—Eberlein wrote a letter to Mr. Seger, auditor of appellants, "denying any knowledge or information of any lease, agreement or understanding made or entered into with the Kern Trading & Oil Company for production of oil on the lands of the Southern Pacific Railroad Company," (R. 2955), thus consistently to the bitter end striving to avoid being "charged with notice".

Nor does Eberlein stand alone in the condemnation which these revelations merit. His chief, Judge Cornish, while he is not shown to have instigated, at least approved his course and himself initiated the counsel of prudence that the correspondence be segregated and secreted. In the Fall of 1904 Eberlein had a conference in New York with Judge Cornish concerning the lease (R. 1126). Judge Cornish "considered it an improper lease to be made, having reference to the selection list of lands in the immediate neighborhood". (R. 1127.) At this conference Judge Cornish instructed Eberlein to keep "those" papers to himself. "He said they might hereafter be necessary for my protection", Eberlein testified. "They have been kept by

me ever since—and incidentally for his own protection,” he added (R. 1128).

Judge Cornish, as already shown, kept his file of “those papers” segregated and secreted. He preserved them until he believed that the fire of 1906 had destroyed Eberlein’s file in San Francisco. He informed Eberlein on his private car out of Ogden in 1907 that, since the fire had destroyed Eberlein’s copy of the file, he had caused his to be destroyed (R. 1074). For some reason Eberlein did not inform his chief that he had with great secrecy, aided by George A. Stone, caused copies to be made from the scorched remains of his, Eberlein’s, file and, as far as the record discloses, Judge Cornish died in ignorance of the existence of the letters and documents the production of which was compelled by *subpoena duces tecum*.

Is it possible to escape the conclusion that Judge Cornish was not ignorant of Eberlein’s fraud and guilt?

But the chapter does not end here. Julius Kruttschnitt is convicted out of his own mouth of no higher sense of duty or obligation than that which Judge Cornish and Mr. Eberlein entertained. At the period of time here under review he was in charge of the affairs of appellants on the Pacific Coast and therefore he may be held to speak *ex cathedra*. He testified that “it was none of Mr. Dumble’s business to examine unpatented lands;

but, if he did so, I think it is quite natural that Mr. Eberlein should object. The assumption that Mr. Dumble did make such examinations is altogether hypothetical; but, if he did so, Mr. Eberlein's fear of being embarrassed in the land office in getting patents was quite natural. He had had experience of this sort because the land office had in 1900 kept back a large area of lands and delayed patenting them for several years because of suspicions that there was oil in them and after this long delay they finally issued the patents. *If I had known that Mr. Dumble was doing anything of that kind, I would have stopped it*" (R. 3101). It now becomes manifest that the system referred to was endorsed and fostered by Mr. Kruttschnitt himself. It may be said in behalf of Mr. Eberlein that his outlook was naturally narrow and confined to the limits of the land department whose duty it was to select lands and secure patents to them apparently at whatever cost; but no extenuation can be urged in behalf of Mr. Kruttschnitt. It may be assumed that the land department and geological department were co-ordinate branches; but over and above and directing them was Mr. Kruttschnitt himself. Whatever the land department knew and was doing he knew; whatever the geological department knew and was doing he knew. He could not keep his right hand from knowing what his left hand did. The foregoing excerpt from his testimony throws a flood of light upon the question presented by this record. Mr. Kruttschnitt says in effect that, if he had known it, he would not have allowed Dumble to

examine unpatented lands because of the embarrassment which information which he might secure of their mineral character would cause Eberlein. In other words, while appellants were maintaining a corps of expert geologists, it was not their policy to permit knowledge acquired by them to reach the land department upon which rested the duty of securing patents and, in connection therewith, of making known to the United States government the truth about lands to which it was endeavoring to secure patents. For what purpose, except to guide in selections, were the Southern Pacific geologists examining unpatented lands? To whom did they report? Not to the land department (R. 1043 and 1091); but to Mr. Kruttschnitt (R. 3080-3). Mr. Kruttschnitt's complacence, it may be respectfully submitted, is amazing. He tranquilly shuts his eyes to the fact that both the land department and the geological department were parts of a common whole and that, in their respective spheres they represented the Southern Pacific interests. It does not lie in the mouth of appellants to say that, because they purposely strove to keep knowledge acquired by the geological department from the land department, they were ignorant of what either of these departments knew. It cannot be doubted upon this record that Eberlein believed in the mineral character of the lands in suit; but, whether he did or not, the knowledge which his superiors possessed is imputable to him. The non-mineral affidavit which he made was knowingly false; but for the purpose of this case it is not



necessary that it appear that it was known *by him* to be false. His act in making it was the act of the Southern Pacific Railroad Company and, insofar as it is concerned, the affidavit was false and fraudulent, if for no other reason, because the Southern Pacific Railroad Company had knowledge through another department that the facts in it represented to be true were false. Mr. Kruttschnitt, fixed with knowledge imparted to him by his geologists and knowing of and aiding Eberlein in the matter of securing action upon the selection list, was, in contemplation of law, as much responsible for the falsity of the non-mineral affidavits as was Eberlein himself.

In giving the testimony above set out Mr. Kruttschnitt evidently was endeavoring to refute Eberlein's evidence of Dumble's examination of unpatented lands including the lands in suit; but Dumble in his testimony contradicts him at this point. Witness his evidence on pages 2985-6-7 of the record, where it clearly appears that he in effect admitted to Eberlein that he had made such examination, but says that he denied that they would have the effect which Eberlein feared. When Dumble was asked what danger he referred to in his letter of March 15, 1907, to Eberlein in which he wrote:

"Early in December we had a further conference on the matter and you explained that you were rushing certain lands for final patent and that the immediate execution of the lease, showing our idea of what were oil lands, might interfere with you and we agreed to defer the execution until that danger was passed."

he answered as follows:

“The danger that I referred to was just as I stated; danger of interfering with him and the *danger that these lands might be delayed and not be patented because of their mineral character.*”

Enough has already been shown to demonstrate Dumble's appreciation of the position in which appellants' selection list was placed by what was imported in the proposed lease to the Kern Trading & Oil Company. He not only agreed upon this point with Eberlein, but wrote the letter to acting general manager Bancroft in which he suggested that “for reasons of policy respecting unpatented lands” the execution of the lease be deferred until “that danger is passed”.

May it not with propriety be here stated that, if Mr. Kruttschnitt and Mr. Dumble and Mr. Eberlein were afflicted with the ignorance concerning the lands in suit which they as witnesses claimed for themselves, they were guilty of culpable and inexcusable negligence? All of them knew of the selection list and necessarily of the non-mineral affidavit which accompanied it without which no patent could issue. If Eberlein had been negligent in ascertaining the true character of the lands in suit or had purposely refrained from causing examinations to be made in order that his mind might be charged with no knowledge of their character at the time when he executed and tendered the several non-mineral affidavits, the government would be legally

entitled to a cancellation of the patent. A false representation may be made in contemplation of law without actual knowledge of either its truth or falsity, as in the case where a party has affirmed his knowledge by a positive statement that implies knowledge; or when made under circumstances in which he ought to know, if he did not, of its falsity, as where, having special means of knowledge, it is his duty to know. But the case disclosed by the evidence is much stronger than this. It appears that Kruttschnitt, Herrin, Stone, Cornish, Owen, Markham, Dumble and Eberlein believed, if they did not know, at the time when the non-mineral affidavits were made and tendered, that the lands in suit were mineral in character. Their knowledge or the knowledge of any one of them was the knowledge of appellants. Reviewing briefly, it is quite clear that prior to December 10, 1903, Mr. Kruttschnitt was anxious and solicitous in regard to list 89; that he was urging prompt action in arranging for the selection and believed that the lands were mineral lands; that it was such a belief on his part that prompted his letter to Chambers urging special attention; all of which caused Eberlein's declaration that he was "particularly anxious in regard to this list as the lands adjoin the oil territory and Mr. Kruttschnitt is very solicitous in regard to it". It was Mr. Kruttschnitt who originated the organization of the Kern Trading & Oil Company (R. 3085). He held many conferences with Eberlein in the matter of securing patents (R. 3081). It was his purpose to have all lands that were considered to be

either actual oil lands, probable oil lands or possible oil lands turned over to the Kern Trading & Oil Company so that it could control them (R. 3085). He received Dumble's letter of November 20, 1903, enclosing a list of lands to be leased to the Kern Trading & Oil Company and maps (R. 3086). This is the letter in which Dumble described the lands other than those having wells on them as "probable oil lands" (R. 2926-7). (In this classification came section 31 of township 30-23 which corners with the lands in suit.) Each important step in this matter was referred to him. He first learned, he said, that land in township 30-23 had been selected and patent was being applied for when this lease was in course of preparation (R. 3087). He knew of the friction between Eberlein and Dumble with reference to the lease (R. 3081).

From the foregoing it is established by Mr. Kruttschnitt's own admissions that he knew of selection list 89 and knew, while it was pending, that his geologists had advised the inclusion in a lease to a "fuel oil development" company (R. 3084 )of lands in the immediate vicinity of the lands described in list 89, one section being in the same township. Complete ignorance on his part, therefore, of the selected lands is not compatible with the high order of intelligence and ability necessary to fit one for the discharge of the duties of the responsible position filled by Mr. Kruttschnitt. Or did he, by closing his eyes to obvious things, think to achieve a feat paralleling that essayed by



Eberlein who, knowing all that the lease to the Kern Trading & Oil Company imported, strove to absolve himself from the responsibility which that knowledge imposed by merely declining to execute it? After three years Eberlein denied all knowledge of the lease! Was Mr. Kruttschnitt's memory *in pari passu* with that of Eberlein?

#### CONCLUDING SUMMARY.

The grant under which appellants claim excepts from its operation all "mineral lands", the broadest reservation in any of the acts of Congress affecting the disposition of the public domain except the homestead act under which by a late amendment the same reservation is made. In *Davis vs. Weibbold*, 139 U. S. 507, and in the other cases urged upon the attention of the court by appellants the exception is more restricted, a fact pointed out by Judge Hook in the decision of the Circuit Court of Appeals for the Eighth Circuit in the Diamond Coal and Coke Company case, 191 Federal, 786, and by Judge Ross in the Cosmos Exploration Co. case, 104 Fed. 47. In the Supreme Court of the United States Mr. Justice Van Devanter, citing as authority *Deffenbach vs. Hawke*, 115 U. S. 392; *Colorado Coal & Fuel Co. vs. United States*, 123 U. S. 307; *Davis vs. Weibbold*, *supra*, and other cases, announces that, to justify the annulment of a homestead patent as wrongfully covering mineral land, it must appear that the known conditions at the time of the proceedings which resulted in the patent were plainly such as to engender the belief that the

lands contained mineral deposits of such quality and in such quantity as would render their extraction profitable and justify expenditures to that end. The announcement thus made in this, the latest and highest authority upon the question, is the criterion by which is to be determined whether the lands in this case were in contemplation of law within the exception of "mineral lands" in the grant at the time of the proceedings which resulted in the assailed patent. It is the resolution by the Supreme Court of all antecedent cases and authorities into the doctrine and proposition of law that a patent to lands as agricultural or non-mineral lands will be set aside when it distinctly appears that the known conditions with reference to them were plainly such as to engender the belief that they were valuable mineral lands and it is needless and futile to review the authorities thus crystallized into a standard by which the question in this case is to be finally decided. 223 U. S. 236; 58 L. Ed. 936.

It is manifest that the belief described in the formula extends not only to the existence of the mineral, but to its quality and quantity. If appellants do not depart from the position taken by them upon the argument before Judge Bean, they will contend here that, in the absence of absolute knowledge, no fraud or imposition can be attributed to them. This contention begs the question. The inquiry is, Were the known conditions with reference to the lands in suit plainly such in December, 1904, as to engender the belief that they contained

commercial oil? It was accordingly not necessary for the government to show that the lands actually contained oil in commercial quantities, but only that the known conditions were plainly such as to engender the belief that they did. In the Diamond Coal & Coke Company case there was no evidence that the eye of man had ever seen an ounce of coal on the lands there in suit; and yet the Supreme Court held that the patent in that case should be annulled for the reason that the evidence proved that the known conditions there were plainly such as to engender the belief that they contained commercial coal.

In the case of United States against Southern Pacific Company et al. pending in the District Court of the United States for the Southern District of California—A case involving questions similar to those in the instant case—the defendants on a motion to dismiss, heard November 13, 1914, put forward the same contention made here. Their counsel then said: "To sum up, our position is this: Knowledge, necessary to form the basis of a fraud such as is here charged, means more than mere belief or hope or even speculative geological deduction. It can be derived only from actual discovery and certain demonstration."

The *reductio ad absurdum* of the contention there made and here repeated is reached in the necessary conclusion that, if upheld, it would follow that the Southern Pacific Railroad Company would under the grant of July 27, 1866, be entitled to all oil lands

within the limits of the grant except those upon the legal subdivisions of which wells had been drilled prior to patent from which oil had been produced and to all other mineral lands upon which actual discovery of minerals in paying quantities had not been made. It has already been indicated herein that this contention is identical that that made in the Diamond Coal and Coke Company in the Diamond Coal and Coke Company case. Its brief is printed in connection with the report of the case in volume 58 of the Lawyers' Edition of the United States Supreme Court reports and, for convenience, the following portions thereof, beginning on page 936 thereof, are set out:

(a) "The construction given to statutes by those charged with the duty of executing them is always entitled to the most respectful consideration and should not be overruled without cogent reasons."

(b) "The established practice of the Land Office which should be regarded as a rule of property has been to deny entries of lands as coal lands or mineral lands unless the same are shown to contain within their limits developed and opened mines, or deposits of coal of commercial value, or other minerals in quantity sufficient to justify the development and exploitation of the land, and to render it more valuable for mineral than for other purposes; and it has been the uniform practice to require evidence of the existence of coal or other mineral deposits upon the land itself. The fact that the land was surrounded by land containing either coal or other mineral or that it was adjacent to mineral lodes or coal veins or even that the land itself contained small quantities



of mineral or surface cropping of coal undeveloped, has always been held insufficient; and, where the character of the lands as mineral or coal lands was not established by such proof and evidence of mineral value, the land has always been held properly enterable under the homestead and other non-mineral acts."

(c) "The views of the Land Office were not erroneous; on the contrary, they have been repeatedly approved by the decisions of this court and of the lower Federal courts and State courts which have had occasion to consider the questions involved."

(d) "From the decisions of the courts and the Land Office, we believe that it can be said without successful contravention, that the following propositions are firmly established:

\* \* \* \* \*

"Second, in order to bring the land within the allegations of the bill, that is, to render it only enterable under the coal land law, it must have been shown that it contained known mines or deposits of coal, of a workable character, and of sufficient extent to make the lands more valuable on account of their existence for coal mining than the lands would be for agricultural purposes.

"Third, the mere presence of coal croppings or coal mines in the vicinity of the lands in question cannot determine the character which must be assigned to the land. On the contrary, it must be judged by the known physical features of the identical lands in question."

It has already been shown that the foregoing contentions were resolved against the Diamond Coal and Coke Company and in favor of the government.

The learned judge before whom the motion to dismiss the case of the *United States vs. Southern Pacific Company et al.* in the Southern District of California was argued likewise decided the contention in that case against the defendants and in favor of the government. (225 Fed. 197.)

Notwithstanding the decision in the Diamond Coal & Coke Company case and the adverse ruling of the District Judge in the case of *United States vs. Southern Pacific Co. et al. in the Southern District of California* and yet other decisions of like character appellants fail to discriminate between the instant case, where the government charges that appellants by fraudulently representing lands to be non-mineral in character secured patents to mineral lands in violation of the terms of the granting act, on the one hand, and the cases of an applicant for a mineral patent who is required to show a *discovery* before he can secure his patent and of a contest between rival mineral locators where it is required that a showing of *prior discovery* be made in order to establish a right to patent, on the other hand.

The case of *Miller vs. Chrisman*, 140 Cal. 440; 197 U. S. 313, upon which appellants appear to rely, was a contest between two rival mineral claimants and consequently can have no application or bearing here. By section 2320 of the United States Revised Statutes a mineral patent can only be obtained where there has been an antecedent location

perfected by "the discovery of the vein or lode within the limits of the claim located", section 2329 providing for placer claims "like circumstances and conditions" provided for vein or lode claims. Under such circumstances discovery is affirmatively made the *sine qua non* of patent; but the doctrine applies only to cases involving patents under the public mineral land laws of the United States. The Supreme Court in the Diamond Coal and Coke Company case squarely held that a discovery is not necessary to constitute land mineral land in cases like the one now under review. In announcing the rule that it is "the known conditions" which are determinative of the question the opinion states that the argument of counsel had departed from "settled rules of decision applicable in cases like this" and that therefore "it will be appropriate to recite these rules before turning to the evidence." Thereupon the court laid down the criterion that lands are mineral lands when the known conditions are plainly such as to engender the belief that they contain valuable mineral deposits.

The doctrine in question is not new in the Ninth Circuit, but has long been recognized here as well as elsewhere in the United States.

*Cowell vs. Lammers*, 21 Fed. 206;

*Franconer vs. Newhouse*, 40 Fed. 621.

In both of the foregoing cases Judge Sawyer wrote the opinion and he uses this language:

"By the words (mineral lands) must be

understood lands known to be such or which there is *satisfactory reason to believe are such at the time of the grant or patent.*"

Manifestly the language just quoted negatives the idea that the discovery of minerals in paying quantities must be made before lands can be classed as mineral lands.

In *Cosmos Exploration Co. vs. Gray Eagle Oil Co.*, 104 Fed. 20, Judge Ross recognized and gave expression to the same doctrine. This case has already been reviewed herein and pause is here taken only to refer to the fact that in that case, as in the instant case, a non-mineral affidavit was filed. Judge Ross found that the parties under whom the Exploration Company claimed *at least believed* that the lands which they sought to acquire under an agricultural patent or selection contained oil and held that, if, instead of filing false non-mineral affidavits, they had made known to the land officers the fact of their belief, "no one can doubt that the local land officers would have refused to file or receive the application." Judge Ross stated that, if under such circumstances the selectors had obtained patents, the patents would have been cancelled at the suit of the government, citing *Finn vs. Hoyt*, 52 Fed. 83, when in fact he had in mind *United States vs. Culver*.

In *United States vs. Culver* the government sought to cancel certain patents issued pursuant to cash entry from which mineral lands were excluded. It



appeared that the parties had personally examined the lands and had had them examined by a mineral expert who reported to them his belief as to their true mineral character. The Court said in part:

"Their act in buying them by cash entry as agricultural land, with such knowledge as to their true character, would vitiate the sale by the government to these parties, and they would not be entitled to hold the land because of the fraud perpetrated by them upon the officers of the government. It is claimed by the defendant that these lands were thrown open to purchase by cash entry by the proclamation of President Rutherford B. Hayes, of October 8, 1877. If they were lands valuable for mineral, they were not so thrown open to purchase by the said proclamation, as the same expressly exempted from sale 'all lands appropriated by law for the use of schools, military or other purposes.' \* \* \* If there had been no fraudulent concealment by Culver and Julian Ramsey, but, under the law, the lands were reserved from sale, the rule is well settled that the defendants obtained no title by their purchase; that the sale is absolutely void. *Morton vs. Nebraska* (21 Wall. 660). \* \* \* The preponderance of evidence shows that the lands were valuable for mineral, and that the defendant Culver and Julian Ramsey, the ancestor of the other defendants, knew this fact at the time of the purchase of the land.

"Upon both grounds above set out the patent must be held void, and a decree should be entered for the cancellation of the same, and it is so ordered."

It is submitted that the evidence in the instant case at all points fulfills the requirement of the

standard laid down by the Supreme Court. In short, the government has proven by that class of evidence which commands respect and that amount of it which produces conviction the following propositions:

1. That the test laid down by the Supreme Court in the Diamond Coal and Coke Company case with reference to coal lands is likewise applicable to oil lands.

2. That the structure of the lands in suit is ideally favorable to the accumulation and retention of oil.

3. That the lands in suit were in a recognized oil belt and were surrounded on all sides by surface evidences and exposures of oil, gas, asphaltum and brea.

4. That oil development in the vicinity of the lands in suit had reached such proportions in 1904 that from McKittrick to Sunset, a distance of thirty miles, there were two hundred and eighty-one producing wells, a number of them being within two or three miles of the lands in suit.

5. That the strata of oil-bearing sands outcropping in the exposures mentioned and proved by the wells mentioned to contain oil in commercial quantities dipped and extended towards and under and beyond the lands in suit.

6. That the lands in suit themselves showed surface evidences of the presence of oil underneath,

being situate upon a fold or anticline which is a continuation of the fold or anticline at the westerly end of which in 1904 there were two producing oil wells and along whose extension towards the lands in suit there were exposures of oil-sands impregnated with oil and asphaltum.

7. That the lands in suit had no value for agricultural purposes and only negligible value for grazing purposes and were practically worthless unless valuable for oil.

8. That by reason of these conditions the belief was general in 1904 that the lands in suit were oil lands, this belief manifesting itself in many attempts to locate the lands under the mineral land laws of the United States by persons skilled and unskilled in oil geology and oil development.

9. That appellants themselves believed in 1904 in the oil character of the lands in suit, as shown by the declarations, admissions and acts of their skilled and trained geologists who examined and investigated the lands in suit and in some instances sought to acquire them for themselves, as well as by the acts and declarations of other responsible officials.

10. That appellants, in order to secure patent to the lands in suit under an act of Congress granting to them only agricultural lands, expressly excepting mineral lands from the operation thereof, believing them to be mineral lands, not only withheld the

knowledge which they had of their true character, but falsely and fraudulently represented them to be non-mineral agricultural lands of the character contemplated by the grant, the evidence of these facts consisting of the acts, declarations and admissions of responsible officials and agents of appellants, as also of a series of letters and documents bearing positive and direct witness to the knowledge and belief of appellants of and in the oil character of the lands in suit and their design and purpose to deceive the land officers of the government in regard thereto.

In addition to the foregoing it is submitted that it has been clearly shown herein by reference to the evidence and undoubted facts, as well as to the pertinent authorities, that prior to patent the government neither investigated nor ascertained the true character of the lands in suit, but had the right to rely upon and did rely upon and was deceived by the proofs offered by appellants.

As stated at the outset of this brief, the government is mindful of the respect due to its patent, the presumption that all the preceding steps required by law were duly observed and the requirement that, in order to annul the patent here called into question, it must bear the burden of proof and sustain it by that class of evidence that commands respect and that amount of which produces conviction; and the government confidently submits that it has successfully met these tests and that, even if



the question were now one of first impression and to be decided originally by this appellate court, it must be resolved in its favor; *a fortiori* should it be so resolved in view of the presumptive correctness of the decision of the trial court the judge of which had before him for his guidance the full transcript of the evidence by questions and answers, which in this court is, under the rules of practice in equity, presented in condensed form, in many instances no more than the mere substance being stated.

## PART II.

### DEVELOPMENT SUBSEQUENT TO PATENT ON EVEN-NUMBERED OR NON-RAILROAD SEC- TIONS ADJOINING THE LANDS IN SUIT.

From Part I of this brief the government has sought to exclude reference to all evidence of transactions occurring and knowledge derived after the issuance of the assailed patent. It is pointed out in the Diamond Coal and Coke Company case that, since applicants' proofs and the findings of the land officers were directed to the situation at the time of the issuance of patent, so the inquiry by the court as to the question of mineral character must be directed to the situation at that time. In that case there was evidence that after patent a slope was driven from the outcrop of coal to the east to within five feet of the vertical boundary of one of the sections in suit "and in good coal all the way"; but the court held that while this was "a

fact proved", it was not to be considered "because in the nature of a discovery subsequent to the entries".

Accordingly, when appellants undertook at the trial to introduce evidence concerning wells drilled in the Elk Hills (but not upon the specific lands in suit) in 1910 and thereafter, the government took the position that the evidence was incompetent. This evidence was offered prior to the decision of the case in question under the authority of which it is clearly incompetent and "not to be considered here". However, while it was introduced by appellants for the assigned purpose of proving the non-mineral character of the lands in suit, it has the opposite effect and demonstrates that upon lands lying in the midst of the several sections in suit successful and productive oil wells were drilled in 1910 and in 1911 by the Associated Oil Company, a subsidiary of the Southern Pacific Company. It is, accordingly the office of Part 2 of this brief to point out both the utter failure of appellants to prove by the evidence in question the non-mineral character of the lands and the notable effect of the evidence in corroborating the competent evidence of their mineral character.

By way of parenthensis, it may not be out of place to comment on the position taken by appellants with regard to this matter. That position necessarily is that, even if the known conditions prior to patent were such as to engender the belief

that the lands were mineral in character and even if they practiced fraud in acquiring patent to them, nevertheless, if subsequent to patent there have been developments which tend to negative mineral character, the government ought not to succeed in this suit for the reason that it has not been damaged. Appellants' argument amounts to this: However cogent was the proof by the known conditions prior to patent of the mineral character of the lands and however fraudulent may have been their efforts to secure patent to them, they ought not be penalized for a mistake of their officers and servants in relying upon the known conditions and in believing that they were securing patent to interdicted mineral lands. The evidence which they introduced to this end, far from subserving the purpose for which it was introduced, will be shown to have reacted and demonstrated the combination in certain officers and servants of appellants at the time of the proceedings which resulted in patent of good judgment and bad morals.

In addition, the evidence in question absolutely demonstrates the soundness and correctness of the position of the government that the evidence proves that the known conditions were plainly such as to engender the belief that the lands in suit were valuable oil lands. This necessarily follows from the fact that the Associated Oil Company, a subsidiary of the Southern Pacific Company, in 1910 and without addition to the sum of human knowledge in 1904 concerning the lands in suit entered upon the

development of them and expended in that enterprise, as appellant's witnesses have testified, more than half a million dollars (R. 3123). The position of the government is that these known conditions were plainly such as to justify expenditures. The proof by appellants is that their subsidiary entertained that opinion and, having faith in it, spent five hundred thousand dollars. To adopt Mr. Justice Van Devanter's phrase concerning the Diamond Coal and Coke Company, "The Associated Oil Co. was a practical concern operated by practical men. It was hardly intending to make an aimless or grossly excessive expenditure". Nevertheless, with no greater knowledge or information than that possessed by Blodgett, Youle, Owen and Treadwell in 1904, because of belief and faith in the oil character of the Elk Hills it spent lavishly of its stockholders' money and, while it ceased operations on some of its wells because of poor judgment in locating them, it succeeded in bringing in three commercially productive wells.

Appellants will doubtless assert that prior to the Associated Oil Company's operations in the Elk Hills a large well had been brought in in the Buena Vista Hills by the Honolulu Oil Company and that this fact was a contribution to knowledge of the conditions in the Elk Hills. They have heretofore deprived themselves of the use of this contention by the evidence of their expert geologist and witness, F. M. Anderson, who testified, as already shown, that there is absolutely no connection be-



tween the two uplifts, the Buena Vista Hills and the Elk Hills, and that the formations in the two are in nowise correlated. By reference to this position the government does not mean to agree with it and only cites it because of the fact that it prevents appellants from now saying that a successful well in the Buena Vista Hills is evidence of oil in the Elk Hills. Indeed, both Anderson and Ochsner testified to their firm belief and conviction of the high character of the Buena Vista Hills as oil lands in 1904 at the very time when they now say they condemned the Elk Hills. Moreover, as already shown, there were in 1904 producing wells two, three and four miles from the lands in suit, while the Honolulu well is in section 10 of township 32-24, nine miles distant from the nearest of the lands in suit. It is not easy to believe that "a practical concern" like the Associated Oil Company was influenced by the psychology of panic and excitement following the Honolulu discovery, as appellants have endeavored to explain the enterprise of others in locating oil lands. The argument from psychology will hardly reach the Associated Oil Company, the chairman of whose board of directors is shown by the evidence to have been Mr. Wm. F. Herrin, who was likewise general counsel of the Southern Pacific Company. The record shows that Mr. Herrin was present and presided at sundry meetings of the executive committee of the board of directors of the Associated Oil Company when the questions of operations and expenditures in the Elk Hills were up for consideration (R. 3613-47).

Passing from manifest things to the evidence concerning the result of the operations upon the even-numbered sections in the Elk Hills, it is disclosed that on three of them, 24 and 26 of 30-23 and 30 of 30-24, which will hereinafter be referred to as 24, 26 and 30, respectively, large and successful producers were drilled. Some wells were drilled by the Associated Oil Company and other concerns that did not prove successful; but in this connection let it be remembered that there is probably not in the entire world an oil-field in which there are not unsuccessful wells.

On September 2, 1912, by executive order the President of the United States withdrew and reserved the lands in this suit and the adjoining and contiguous sections of land in township 30-23 and 18 sections in other townships in the Elk Hills, in all 42 sections, to be held for the exclusive use and benefit of the United States Navy. This withdrawal was based on geological investigations of Robert Anderson and other geologists of the United States Geological Survey. In August, 1912, after stating that Mr. A. C. Veatch and Dr. John Casper Branner had considered the lands in this suit as probably oil lands, Mr. Anderson in a report to the United States Geological Survey, in which he referred to the wells drilled in the Elk Hills which had not proven successful, stated that he believed that in most cases the tests were not adequate, but called attention to the three successful wells of the Associated Oil Company which he understood from

varying reports would produce from forty to five hundred barrels of oil per day of from 27 to 29 degrees gravity (Ex. 5-T).

In November, 1912, Mr. Anderson reported results of a recent visit to the Elk Hills and stated that it was his opinion that the area would yield a large quantity of oil which, to be conservative, he estimated at 100,000,000 barrels (Ex. 5-V). He had originally estimated the oil content of the Naval Reserves to be 250,000,000 barrels. In this report he refers to the various wells that had been drilled in the Elk Hills region and came to the conclusion that the southwest fringe of the hills, along which were drilled the unsuccessful wells, would not be as productive as the summit region where the lands in suit lie. He then proceeds to say that the only three wells drilled to an adequate depth in the central part of the hills were those of the Associated Oil Company and that each of these struck zones in which the oil was under pressure and spouted, that on section 30 having produced at least 150 to 300 barrels per day for several days and then sanded up; another on section 24 having come in at the rate of a thousand barrels per day and having yielded an average of 200 barrels per day for a week and also sanded up (R. Ex. 5-V). He also reported that showings of oil had been found in almost every one of the deep wells in the hills, proving that a considerable amount of oil is disseminated through the strata, and indicated that a more productive source may occur below.

In the further discussion of this question this brief will separate the successful and unsuccessful wells and will first proceed to set out the evidence which shows that the former justified the expenditures involved in their drilling and place beyond question or peradventure the oil character of the lands in suit, and will follow with the details of the evidence concerning the unsuccessful wells showing the reasons for their failure.

#### **SUCCESSFUL WELLS OF THE ASSOCIATED OIL COMPANY.**

There is no question whatever that in 1910 and 1911 the Associated Oil Company was a subsidiary of the Southern Pacific Company, the latter owning and holding a majority of its capital stock (R. 3593). Mr. Wm. F. Herrin was general counsel and a director of the Southern Pacific Company and at the same time president and a director of the Associated Oil Company and chairman of its executive committee (R. 1392, 1400; 3107-8, 11-12; 3597-8; 3602-3-4-5; 3613-47). P. G. Williams, who testified first as a witness for appellants, was called by the government in rebuttal on November 28, 1913. He was secretary and auditor of the Associated Oil Company and had general custody of the records of the corporation including the minutes of meetings of the board of directors, the executive committee and stockholders, as also the annual statements issued by the company from the date of its organization, October, 1901, to the year 1912. The annual statements for the several years show the officers throughout that time and are set out on



page 3593 *et seq.* of the record. The minutes of the meetings of the executive committee of the board of directors were read into the record and are found on page 3613 *et seq.*

These minutes contain and expose the history of the proceedings by which the Associated Oil Company acquired possession of the lands in question and the successive steps in the matter and progress of drilling on sections 24, 26 and 30. At practically all of the meetings Mr. Wm. F. Herrin presided. It is interesting to note that on March 21, 1911, it was reported to the committee by the general manager that the mineral filings on which the company's title was based were made subsequent to September 27, 1909, the date of the withdrawal by President Taft of a large area of land including all of the Elk Hills. Finding that other persons, Messrs. McKittrick, Jastro, Tevis and others, of Bakersfield, had located sections 24, 26 and 30 prior to September 27, 1909, for fuller's-earth, the general manager recommended the acquisition of the McKittrick et al. titles "for the reason that they were made prior to September 27, 1909", and because the work which the Associated had already done, if applied against these filings, would insure the issuance of a patent to the Associated upon the discovery of oil on each quarter-section, which, to use the general manager's own words, "I think probable". The proceedings with reference to this matter and the consequent action are set out on pages 3623-4-5-6 of the record.

The "Messrs. Mc Kittrick, Jastro, Tevis et al. of Bakersfield" were the gentlemen who claimed adversely to the Associated Oil Company and whose application for patent based upon an alleged discovery of fuller's-earth was protested by the parties under whom the Associated claimed, leading to the contest in the Land Office at Visalia in which the officers and servants of the Associated Oil Company, including L. J. King, its superintendent, W. A. Williams, its chief geologist, testified that these lands were oil lands and chiefly valuable as such; that there was no commercial fuller's-earth in them; that the Associated Oil Company had drilled successful wells and that such wells as had been drilled elsewhere in the Elk Hills and were unsuccessful had failed to get oil in commercial quantities because of unfavorable location, errors in drilling or for other reasons (Exhibits 9-C, 9-E, 9-M and 9-O).

In the meantime drilling was proceeding and on August 29, 1911, the general manager advised the committee that he had issued instructions to proceed with the drilling of wells No. 3 on 24 and well No. 1 on 30; and, with reference to the well on 26, to discontinue work as soon as the field department had completed perforating the well and testing it to see the result (R. 3633). He also gave instructions to stop work on certain specified wells (R. 3633). The explanation of the order for the cessation of work on the specified wells appears in the minutes of the meeting of November 28, 1911 (R. 3637). At that meeting the general manager reported in part as follows:

"This well on section 30 is now 3,836 feet deep, having passed through 12 feet of oil stratum at 2,713 feet. We have already expended on the five sections of land which we hold under lease in Elk Hills \$418,000. The Field Department advises that if we forfeit these leases, applying for patents on the 160 acres in sec. 26 and the 160 acres in sec. 30, on which we have made discoveries of oil that we can remove material which will effect a salvage of approximately \$100,000, the net result being that we would be in position to ask for patents on 160 acres in sec. 26 and 160 acres in sec. 30, which will be done at once, and doing no further work on any of the other lands. Under those conditions these two wells will have cost us \$318,000, provided the salvage is \$100,000, as stated above. Our legal department is unable to advise us definitely what the action of the Interior Department will be in regard to these lands, but construes the Pickett bill to mean that in order to hold lands and eventually acquire patent thereto, we must legitimately carry on the work on each of the twenty quarter-sections involved in a manner to make a discovery of oil. This would mean that to be safe we must select these quarter-sections at this time on which we deem it advisable to carry on such work. The work on each quarter-section would cost approximately \$5,000.00 per month in order to conform to this construction and if work is carried on on the eighteen quarter-sections on which discovery has not been made this would mean an expenditure of approximately \$90,000.00 monthly. There are also conflicting mineral claims on these lands owned by other parties who claim title by reason of discovery of fuller's-earth. These claimants are carrying on work on each quarter-section and have made applications for patent on portions of sections

24 and 30. We would be obliged to contest these applications in the Land Office.

“In view of the uncertainty as to the status of our right to obtain patents to any of these lands, even if discovery is made, I recommend that we discontinue work entirely on these lands with the exception of the pumping of well on section 26 and the deepening of well on section 30.” (R. 3638-9-40.)

The foregoing recommendation of the general manager was approved (R. 3640).

The Pickett bill referred to is the Act of Congress of June 25, 1910, by which it was provided, among other things, that withdrawals of public lands should not impair the rights of claimants or occupants who at the date of the withdrawal were in the diligent prosecution of work leading to discovery and thereafter continued in such diligent prosecution of work until discovery. It is therefore manifest that the reason for the cessation of work on wells other than the three wells now under review lay in the fact that the so-called locations under which the Associated Oil Company claimed were made after the withdrawal of September 27, 1909, a fact pointed out and admitted in the minutes of the meeting of December 20, 1910 (R. 3622).

For the purpose of showing the non-commercial character of the three deep wells of the Associated Oil Company in the Elk Hills appellants called as a witness that company's auditor, P. G. Williams (R. 3122), who testified that to December 31, 1912, the well on 24 cost \$56,000.00, that on 26 cost



\$57,000.00 and that on 30 cost \$66,000.00 (R. 3124). This witness stated that he had prepared from the record of his company a tabulation of the production of its wells in the Elk Hills, these tabulations being made up from regular reports or letters of advice sent in by the superintendent in charge from time to time. He thereupon offered the tabulation of the production of each of the wells (R. 3125-6). Following Mr. Williams came Mr. W. E. White, chief clerk of the chief engineer of the Associated Oil Company, A. F. L. Bell. White testified that from reports made to the office of the Associated Oil Company from the field force he had made certain graphic logs of the three deep wells in question and these so-called graphic logs were introduced in evidence by appellants for the purpose of showing the history of the drilling and production of the wells. They are Exhibits 172-3-4. By reference to pages 3159 et seq. of the record it will be seen that counsel for appellants desired to introduce these so-called graphic logs instead of introducing the original reports from which the witness stated that he had made them. Counsel for the government objected to the introduction of the so-called graphic logs unless the original drilling reports which counsel for appellants stated that he then had with him in court were introduced. Thereupon counsel for the government offered in evidence the drilling reports in question and they are contained in the volume of "Documents and Evidence Not Printed". Subsequently, it will be seen by reference to page 3196, these drilling reports were

read into the record by counsel for the government. An examination of them, the original records and reports from the field, shows a condition of affairs and production radically different from and contradictory of that shown on the so-called graphic logs and diagrammatic charts prepared by the witnesses White and Williams and introduced by appellants. It was the evident purpose of these logs and charts to minimize the productive capacity of the three wells in question; but the drilling reports themselves speak the real truth as to this matter and, accordingly, a more or less detailed examination or analysis of these is necessary.

Exhibit 172 is the graphic log or production chart of sections 30 of 30-24 prepared by the witness White, as he said, from the daily drilling reports (R. 3159).

Exhibit 173 is a similar log or production chart of section 26 of 30-23 (R. 3167-8).

Exhibit 174 is a similar log or production chart of the well on section 24 of 30-23 (R. 3168).

On these logs or charts the witness stated that he attempted to make a condensation of several hundred daily drilling reports. Necessarily, this process called for an interpretation by him of the meaning of the daily drilling reports. His cross-examination, beginning at page 3191 and covering more than a hundred pages, discloses many admissions of mistakes, inaccuracies and errors of interpretation on

his part. The details are so great that it would unduly prolong this brief to set them out. It matters little to the court what construction or interpretation the chief clerk to an engineer of the Associated Oil Company placed upon the daily records of drilling and production made by the men in the field in charge of the work and transmitted contemporaneously to headquarters.

L. J. King was superintendent of the Midway division of the Associated Oil Company, which includes the Elk Hills (R. 3155), and it was by him that daily reports of the drilling operations on the wells in question were made (R. 3155). T. E. Barnes was the Associated Oil Company's superintendent of drilling in the Elk Hills (R. 3193, 3275). L. J. King is the same gentleman who testified as a witness for the locators under whom the Associated Oil Company claimed in the Visalia Land Office contest. In that proceeding, in which it appears from the minutes of the executive committee of September 17, 1912 (R. 3646-7), that the Associated Oil Company was protesting through the locators under whom it claimed the right of certain parties to a patent to a portion of section 24 of 30-24 based upon an alleged discovery of fuller's-earth, this same Mr. King appeared as a witness and testified strongly to the mineral character of the Elk Hills and the success of the wells drilled on 24, 26 and 30 (Ex. 9-C, 9-O), as did also T. E. Barnes (Ex. 9-F). For obvious reasons these gentlemen were not produced as witnesses in this case, although they prob-

ably knew more about the three deep wells under discussion than any other persons in the world. Having testified in a contest in the Land Office where the success of the Associated Oil Company depended upon proof of the mineral character of the lands on which these deep wells were drilled and having borne strong witness to their rich mineral character and the eminent success of the wells drilled thereon, they were disqualified to appear as witnesses in this case in which it is appellants' object to prove the non-mineral character of the lands and the non-success of the wells. However, the daily reports of their drilling operations, while not offered in evidence by appellants, were forced into evidence by the government and they may be looked to as faithful expositions of the progress and success of the work of the Associated Oil Company in developing these lands and bringing in highly productive wells. These daily drilling reports begin on page 43 and extend to page 562 of the volume of "Documents and Evidence Not Printed"—contemporaneous records of the work actually done, the formations actually passed through and the gas and oil actually produced.

A thorough analysis of these drilling reports which constitute 500 pages of the typewritten transcript is manifestly impossible without unduly prolonging the discussion and wearying the court with details. The unfairness and inaccuracies of these graphic logs and diagrammatic charts offered by appellants suggest that they are related to the obvious difficulty



on the part of the trial court in going through and analyzing and digesting these contemporaneous records of drilling and production. For the purpose of showing the utter lack of reliability of these graphic logs and charts and for the further purpose of showing that the three deep wells in question were eminently successful wells and demonstrate the mineral character of the lands surrounding them, the government will content itself with asking the attention of the court to the drilling reports setting out the work on and production of the deep well on section 24 for the months of June, July and August, 1912, ending with the twenty-third day of August, at which time, under the orders of the executive committee of the Associated Oil Company of which the chairman was Wm. F. Herrin, general counsel of the Southern Pacific Company, all of the Associated Oil Company's wells in the Elk Hills were shut down. An examination of the specific reports in question will furnish conclusive answer to the suggestion that these wells were shut down because of their unproductive character and will naturally lead the inquiring mind to the question whether the motive which inspired that action was not ulterior and closely connected with the inquiry in this suit as to the mineral character of the lands patented to the Southern Pacific Railroad Company under patent No. 135 of December 12, 1904 here assailed.

The following reports of the drillers concerning the well on section 24 of 30-23 is taken *verbatim* from pages 555-6-7-8-9 and 560 of the volume of "Docu-

ments and Evidence Not Printed". It will be noted that each paragraph begins with a date and is followed by a second in parenthesis, the explanation being, taking for example the first excerpt, that the report was dated June 3, the first date mentioned, and covered the operations of June 1, the parenthetic date.

June 3 (1), 1912, pumped 40 barrels oil, 20 barrels M. & B. S. mostly shale, about 12% water.

June 3 (2), 1912, pumped 2500 feet, 45 barrels oil, 25 barrels bluish shale or rotary mud, 10 barrels water.

June 4 (3), 1912, pumped 50 barrels oil, mud and water.

June 5 (4), 1912, pumped 90 barrels oil, 10 barrels M. & B. S. in 9 hours. Still pumping and shows great improvement.

June 6 (5), 1912, pumped 190 barrels oil and 10 barrels M. & B. S. last 24 hours. Well greatly improving, showing quantities of gas and would not be surprised if it started flowing.

June 7 (6), 1912, pumped 105 barrels net last 24 hours, only slight trace of water.

June 8 (7), 1912, pumped 105 barrels, shows some water.

June 10 (9), 1912, pumped 175 barrels pure oil, showing quantity of gas.

June 10 (8), 1912, pumped 115 barrels practically all oil and pure. Gravity 21.8 cut .9 water .2 B. S.

June 11 (10), 1912, pumped 120 barrels. Showing large quantity of gas. (R. 555).

June 12 (11), 1912, pulled to put on tight gas head.

June 13 (12), 1912, well flowed almost continuously while pulling tubing to put tight head on between 8-inch and 6-inch casing. This morning

- started flowing between casings. At present time is making 800 to 900 barrels. This may not keep up at this rate.
- June 14 (13), 1912, stopped flowing, put tight casing head between 6-inch and 8-inch after this was done, well flowed once through 6-inch casing. Now placing well on pump. Gravity 19.7 cut 3% water, 13% B. S.
- June 15 (14), 1912, flowed 250 barrels through 6 $\frac{1}{4}$ -inch casing, reduced to 2 inch outlet. Will place tubing in well to-day.
- June 17 (15), 1912, flowed 300 barrels through 6-inch casing.
- June 17 (16), 1912, flowing through 6-inch casing spasmodically, put out great quantity of sand. Also making good clean oil, produced at lowest figure 750 barrels oil yesterday. Without doubt will increase in flow.
- June 18 (17), 1912, flowed steadily last 24 hours, made 325 barrels.
- June 19 (18), 1912, flowed steadily 225 barrels, running bailer to agitate and make flow. Stronger.
- June 20 (19), 1912, flowed 200 barrels, hole bridged over at 2940 feet, impossible to clean out with sand pump, putting up tools to break bridge.
- June 21 (20), 1912, flowed 200 barrels, placing bull wheels in derrick and stringing up tools to break bridge at 2940 feet.
- June 22 (21), 1912, flowed 175 barrels, completed rigging up tools and ready to break bridge.
- June 24 (22), 1912, splicing cable, flowed 150 barrels. (R. 556).
- June 24 (23), 1912, well flowed 150 barrels. Finished splicing cable and ready now to clean out bridge.
- June 25 (24), 1912, cleaning out at 2940; well flowed 175 barrels. Sand comes in about as fast as taken out.

- June 26 (25), 1912, cleaning out at 2940; well flowing continually about 150 barrels. So far sand comes in as fast as taken out.
- June 27 (26), 1912, cleaned out to 2950 feet; well flows continually; made 125 barrels.
- June 28 (27), 1912, cleaned out to 2990 feet; gas blows sand out of hole as fast as tools mix it up in bottom. Well flowed 100 barrels.
- June 29 (28), 1912, cleaned out to 2990 feet; comes in as fast as taken out; made 100 barrels.
- July 1 (29), 1912, cleaning out and preparing to wash out bridge with oil in tubing.
- July 1 (30), 1912, connecting up pump to wash bridge out by use of tubing and oil.
- July 1 (30), 1912, connecting up pump to wash bridge out by use of tubing and oil.
- July 2 (1), 1912, running in tubing to wash out bridge.
- July 3 (2), 1912, just got tubing to sand bridge. Start washing today.
- July 5 (3), 1912, washed hole to 2700 feet with tubing and oil.
- July 5 (4), 1912, cleaned out to 2970 feet with tubing and oil. Hole filled with oil and exceeding gas pressure.
- July 6 (5), 1912, washed down to 3220 feet; shows no signs of gas at present time.
- July 7 (6), 1912, washed to 3250 feet; plugged tubing in bottom and pulling out. (R. 557).
- July 8 (7), 1912, pulled out tubing and placing same back to continue washing at 3250 feet.
- July 9 (8), 1912, cleaned out to 3275 feet.
- July 10 (9), 1912, washed down to 3500 feet.
- July 11 (10), 1912, cleaned out to 3700 feet; now pulling out to place on pump.
- July 12 (11), 1912, placing well on pump.



- July 13 (12), 1912, placed on pump at 2500 feet; flowing about 350 barrels per day through tubing. As yet has not flowed all oil out that was put in to wash hole out.
- July 15 (13), 1912, stopped flowing; washing out tubing.
- July 15 (14), 1912, pulling well. Started flowing through 6-inch casing. Made about 360 barrels. Pulling again this morning.
- July 16 (15), 1912, pulled pump. Same was sande'd up. Ran in with bailer, found sand at 2500 feet. Well flowing 75 barrels; no fluid above sand.
- July 17 (16), 1912, flowing 75 barrels.
- July 18 (17), 1912, flowing 75 barrels.
- July 19 (18), 1912, flowing 75 barrels; hole filled up to 2500 feet; in same condition as before washed out.
- July 20 (19), 1912, flowed 100 barrels.
- July 22 (20), 1912, flowed 75 barrels good oil; filled up with sand to 2550 feet.
- July 22 (21), 1912, filled up with oil to clean out.
- July 23 (22), 1912, flowed 75 barrels, agitating with bailer.
- July 24 (23), 1912, filled up with oil and cleaning out at 2600 feet. (R. 558).
- July 25 (24), 1912, repairing clamps between casings.
- July 26 (25), 1912, making clamps to pack off between 6-inch and 8 $\frac{1}{4}$ -inch casing.
- July 27 (26), 1912, filled with oil from sump, cleaned out to 2600 feet; preparing to put on new set packing clamps.
- July 29 (27), 1912, cleaning out; holding gas down with oil.

- July 29 (28), 1912, placed new clamps between casings; cleaned out to 2560 feet.
- July 30 (29), 1912, sand heaved; now cleaning out at 2390 feet.
- July 31 (30), 1912, cleaned out to 2470 feet.
- Aug. 1 (31), 1912, cleaned out to 2525 feet.
- Aug. 2 (1), 1912, cleaned out to 2555 feet.
- Aug. 3 (2), 1912, cleaned out to 2600 feet; well blew out; making considerable quantity of sand, only small quantity of oil.
- Aug. 4 (3), 1912, cleaned out to 2560 feet; flowing at rate of 50 barrels.
- Aug. 5 (4), 1912, cleaning out to 2560 feet; shows bad place in casing; well flowed at rate of 100 barrels.
- Aug. 6 (5), 1912, cleaning out at 2560 feet; flowing 100 barrels.
- Aug. 7 (6), 1912, cleaning out 2560 feet.
- Aug. 8 (7), 1912, cleaning out 2570 feet.
- Aug. 9 (8), 1912, jumped pin on bit of small tools, fishing.
- Aug. 10 (9), 1912, fishing for bit.
- Aug. 12 (10), 1912, fishing for lost drilling bit; well flowing trifle over 100 barrels per day, actual measurement in tank.
- Aug. 12 (11), fishing for drill bit; well flowing 100 barrels per 24-hour day; also flowing regularly with oil a quantity of 3,200,000 cubic feet gas equal to 4 inches mercury in 6-inch outlet. (R. 559).
- Aug. 13 (12), 1912, flowing 100 barrels oil; 3,000,000 cubic feet gas; fishing for drill bit.
- Aug. 14 (13), 1912, flowing 100 barrels oil; 3,000,000 cubic feet gas; fishing for drill bit.
- Aug. 15 (14), 1912, flowing 100 barrels oil; 3,000,000 cubic feet gas; fishing for bit.

Aug. 16 (15), 1912, flowing same prior report; making special fishing tool to fish for lost bit.

Aug. 17 (16), 1912, flowing same as yesterday; will fish for bit today.

Aug. 19 (17), 1912, flowing same, fishing for bit.

Aug. 19 (18), 1912, flowing and trying to get hole cleaned out down to bit; sand running in badly.

Aug. 20 (19), 1912, unable to recover drill bit; will therefore cap well as directed.

Aug. 22 (21), 1912, closing well in tight to shut down.

Aug. 23 (22), 1912, capping and will be closed down today.

Aug. 24 (23), 1912, Elk Hills. All wells shut down. (R. 560).

It appears from the foregoing records, so strictly contemporaneous with the actual operations as to be almost a part of the *res gestae*, that during the month of June, 1912, the well on section 24, although shut down because of work being done on it during five of the days, produced 4410 barrels of oil or an average of 190 barrels per day; and this despite the fact that on June 19 the well bridged over at 2940 feet and continued bridged over throughout the remainder of the month in the face of strenuous effort to break through the bridge. In other words, the production was all from a point above the 2940 foot level and it is noted that on June 24 and thereafter sand was coming in as fast as taken out. Surely, in the face of such conditions as these the record of this well for the month of June, 1912, was phenomenal and such as to demonstrate its high commercial character.

The production attributed to this well by auditor Williams of the Associated Oil Company on page 3126 of the record is 2965 barrels, figures which cannot be reconciled with the figures contained in the daily drilling reports. Appellants sought to do so upon the ground that the drilling reports were mere estimates; but it is hardly to be conceived that such an expert as L. J. King, superintendent of the Associated Oil Company, who had had 25 or more years experience in such matter, could have been as radically wrong as appellants would have the court believe. Furthermore, the Associated Oil Company's so-called monthly record of production was admittedly based, not on production, but on the amount of oil sold, for the witness White, speaking of this matter, says on page 3232 of the record that the totals which he showed—which were identical with those shown by Auditor Williams—was the “amount of oil sold”.

The court is not concerned with the amount of oil sold by the Associated Oil Company from the well on section 24, but with the amount of oil which that well produced, a fact shown only on the drilling reports under review. It does not lie in the mouth of appellants to throw doubt upon their own contemporaneous records.

This incident concerning the well on 24 illustrates all of these production charts introduced by appellants in lieu of the original drilling reports. Auditor Williams furnished a report of the production of



each of the three deep wells and they are found on pages 3125 and 3126 of the record. Their purpose was undoubtedly to show that these wells were failures. If the well on 24, as indicated on page 3126, was doing its best—was allowed to do its best—and was producing the entire time and yielded only 240 barrels in May, 2965 in June, 247 in July and 150 in August, these facts, unexplained would go far towards establishing appellants' thesis that this well was a failure; and appellants were absolutely silent and failed even to hint that during May they were continuously at work on the well and that during the first ten days of the month they were not pumping from the true bottom of the well, but only at a depth of 2500 feet and during the remainder of the month, that is, until the 28th or 29th, they were constantly at work on it perforating the casing and, in fact, finishing the well preparatory to production. This will more fully appear upon reading the drilling reports for May on pages 553, 554 and 555 of the volume of "Documents and Evidence Not Printed". That the work then done was needed and resulted in success is shown by the performance of the well during June, as already set out. As a matter of fact, the well was not ready for the pump until June and what it did in May is of no more importance than what it or any other well does before completion. The fact of non-production before completion shows nothing as to production after completion.

The production, despite unfavorable conditions and five days of idleness during June, has already been shown to have been 4410 barrels.

Now, for July: On the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth and eleventh the well was shut down while the drillers were at work on it, as appears on pages 557 and 558 of the volume of "Documents and Evidence Not Printed". On the twelfth it was for the first time during the month placed on the pump at 2500 feet the while it was flowing 350 barrels a day through the tubing. On the thirteenth it stopped flowing and was not pumped. On the fourteenth, while at work on it, it flowed 350 barrels. On the fifteenth the pump was pulled and found sanded up and the hole was filled with sand to the 2500 foot level, notwithstanding which condition the well flowed 75 barrels. On the sixteenth, seventeenth and eighteenth, although filled with sand up to the 2500 foot level, the well flowed 75 barrels a day. On the nineteenth and twentieth, notwithstanding the fact that it was still filled with sand to the 2500 foot level, it flowed respectively 100 and 75 barrels. On the twenty-first it was in process of cleaning and preparation and this continued on the twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, twenty-seventh, twenty-eighth, twenty-ninth and thirtieth. Even a casual examination of pages 557, 558 and 559 will show that the well was in trouble during the entire month of July. Consequently, what it produced was in spite of trouble and effort to restrain production during

work. Then, too, the actual production shown by the charts is considerably less than that shown by the drilling reports.

For August the drilling reports show the following history: During the first seven days "cleaning out" was in process, notwithstanding which the well on the third was flowing at the rate of 50 barrels, on the fourth at the rate of 100 barrels and on the fifth it actually flowed 100 barrels. On the eighth the drilling-bit was lost in the hole and throughout the time from then until the well was shut down on the twenty-fourth they were trying to recover it, notwithstanding which the well on the tenth flowed a "trifle over 100 barrels per day actual measurement in tank"; on the eleventh, while still fishing for the drill-bit, it again flowed 100 barrels a day and three million, two hundred thousand cubic feet of gas. On the twelfth, thirteenth, fourteenth, fifteenth and sixteenth the performance of the eleventh was duplicated. On the seventeenth it flowed—on the eighteenth it was flowing and the sand had come in from the bottom so that it covered the drill-bit for which they were still fishing. On the nineteenth it was flowing while they fished. On the twentieth, unable to recover the drill-bit, they proceeded to cap the well "as directed" and were engaged in closing it until the twenty-second, on which day the report is, "capping and will be closed down to-day". See pages 559 and 560 of the volume of "Documents and Evidence Not Printed".

Now, Auditor Williams' and clerk White's charts unexplained show a production for August of 150 barrels and they undoubtedly intended that this should be taken to mean that the best the well could do during that month was that amount of oil. The drilling reports just referred to show that during the entire month the well was off the pump and filled with sand up to the 2500 foot level; and that on the eighth the drillers lost in the hole the drilling-bit and spent the remainder of the time before closing down in unsuccessfully fishing for it. Now, this drilling-bit weighed, according to appellants' witness White, author of the graphic production charts, two hundred or two hundred and fifty pounds and was six inches in diameter, the casing in which it was lost being six and one-quarter inches (R. 3278). Here is what the Associated Oil Company's drilling reports show: a well four thousand feet deep, but filled with fifteen hundred feet of sand that comes in faster than it is cleaned out and that has stuck in it at the depth of 2500 feet a two hundred and fifty pound steel bit that lacks only a quarter of an inch of being as large in diameter as the casing in which it is lodged. On this well drillers are constantly at work in efforts to clean out the incoming sand and find and extricate the lost bit. If, under these circumstances, the well produced not a barrel of oil, it would be neither matter of surprise nor show it unproductive; but, on the remarkable other hand, despite these unfavorable, nay, seemingly prohibitive conditions, the evidence of the Associated Oil Company, subsidiary of the Southern Pa-



cific Company, shows that its well on 24 was flowing one hundred or more barrels a day! If that does not speak convincingly of huge productive capacity, surely there is need of the invention of a language better suited to express productivity. It is no wonder that on June 16, when it produced "at lowest figures 750 barrels oil", Superintendent King joyfully predicted: "without doubt will increase in flow" (Volume of "Documents and Evidence Not Printed", page 556)—a prediction which undoubtedly would have been fulfilled but for the influx of sand and the lodgment of the drilling-bit. A well that flows one hundred barrels of oil under such adverse conditions is surely no mean well. It might easily under favorable conditions flow one thousand barrels a day. If appellants rely upon the unskillful work of the drillers of the Associated Oil Company to prove non-mineral character of the lands in suit, they would be nearer success than in urging that the well on 24 constitutes such proof. The one contention would be as sound as the other. Both would, it is with great respect submitted, be absurd!

The inaccuracies and misrepresentations concerning the well on 24 are duplicated in the graphic logs or production charts with reference to the wells on 26 and 30. The former came in as a gusher producing five thousand barrels a day of a very light, volatile oil, 39° Baume, and the latter produced, according to the estimate of Mr. Maxwell, of the Associated Oil Company, made in the presence of L. J. King, superintendent, and J. W. Kingsbury, a mineral in-

spector of the General Land Office, at the rate of five thousand barrels a day. Of course, this was initial production. Later, when the well had "blown its head off", Kingsbury on January 24, 1912, with Mr. McCabe, head driller of the Associated Oil Company, gauged it and found it "producing 385 barrels per twenty-four hours and the gravity of the oil was 24.2° Baume." (R. 3688-9; also 3733).

Both the drilling reports and appellants' diagrammatic log show 159 feet of oil sand in the well on 26. That they so show and that the thickness represented is far greater than the average in the oil fields of California and greater than any of the wells in the Midway save one or two are facts admitted by even so hostile a witness as F. M. Anderson (R. 2629, 2635).

But these logs omit to show that boulders were reported by the drillers in the three wells. An explanation of this omission was asked of White, the author of the logs, as will appear from reading pages 3349 *et seq.* of the record. His reply amounts to this: that, when drillers find boulders, they so report; but that, since they sometimes call other things boulders, he did not in his logs represent the boulders, because he assumed that the drillers meant other than they said. White admitted that his logs failed to show "to some extent" the formations as reported exactly by the drillers (R. 3356), also stating that he did not take occasion to interview any of the drillers to ascertain, when they reported "boulders",

whether they meant what they said or something else (R. 3356). This is more important than it seems and justifies the following reference to the matter. After much insistence White was induced to "explain the reason for making up the report", referring to his logs and charts, Exhibits 172, 173, 174, 175, 176 and 177. Having first said that at the time he made up "that schedule" he did not know that it was to be brought into court nor for what purpose it would be used and that he made it up of his own accord because he thought "it was more desirable than to introduce all our telegrams and all our office records in any court proceedings that might take place," (R. 3423-4), he finally stated that he would explain the reason for making up the report. He said that Mr. E. G. Jeffress, a representative of counsel for appellants, called at the office and wanted some data; that he, White, thought it would be advisable to give Jeffress a summary of the office records; that he knew from other sources that the data were to be used in this case and "for the purpose of supporting the contention that certain lands adjoining the lands affected by the summary were not mineral in character; and that with these facts in mind he constructed the three charts known as defendants exhibits 172, 173 and 174." (R. 3225). He further stated, with reference to exhibits 175, 176 and 177, that they were prepared under the supervision of W. A. Williams, chief geologist of the Associated Oil Company, and he, White, understood that they were for use in any litigation which the company might have affecting these lands, par-

ticularly this litigation (R. 3324). He further admitted that Williams in effect prepared the logs (R. 3325). Finally he was asked this question:

“I understand the log was practically made up by Mr. Williams or in his office and then was checked and the tracing made and this blueprint made from that. Is that correct?”

“That is about the proceeding, as I remember.”

It is interesting in this connection to consider what is disclosed by the record concerning Mr. W. A. Williams, chief geologist of the Associated Oil Company. He was one of the principal witnesses in the Visalia contest in which the Associated Oil Company, backing the locators under whom it claimed, set up the oil character of the lands in the Elk Hills on which these deep wells had been drilled. It will be recalled that certain persons had filed application for mineral patent to some of these lands on the ground that they had made valid discoveries thereon of fuller's-earth. The locators under whom the Associated Oil Company claimed contested the application and introduced evidence on the hearing before the Register and Receiver at Visalia to prove that the lands were not valuable for fuller's-earth, but for oil. He testified that he advised the Associated Oil Company to prospect this land and otherwise bore witness to its oil character, testifying that the wells drilled thereon by the Associated Oil Company demonstrated the oil character of the land (Ex. 9-E). The following situation is therefore presented: Mr.



Williams, the chief geologist of the Associated Oil Company, as a witness for his employer in a Land Office proceeding testified strongly to the mineral character of the lands under discussion. Later, for use in a proceeding in the Federal courts, he prepared diagrammatic logs and charts for the purpose of proving the opposite, that is, the non-mineral character of the same lands. Admittedly, these charts omit to show much of importance and significance that appears in the original drilling reports upon which they are supposed to be founded and from which witnesses for appellants say they were made.

Reverting to the matter of boulders, it will be recalled that appellants' expert witness, F. M. Anderson, testified that the Elk Hills were too far removed from any ancient shore-line to contain sands capable of furnishing a reservoir for oil in considerable quantity. When asked why the same argument would not condemn the Buena Vista Hills, in whose oil character he believed and to which he bore witness, he explained by saying that the Buena Vista Hills themselves contain a shore-line. Further asked if the same might not be true of the Elk Hills, he answered in the negative. He was also asked what are the present evidences of shore-line conditions, and, in reply, indicated the presence of "boulders". If appellants' diagrammatic logs and charts had shown the presence of boulders, all of the props would have been knocked from under Mr. Anderson's argument, since the boulders would prove the

presence of a shore-line in the Elk Hills and thus refute Mr. Anderson's contentions. It is hardly mere accident that the diagrammatic charts and logs omit to show the boulders which the drilling reports show and their omission cannot be explained by the frivolous argument of Mr. White that he did not insert the boulders because drillers sometimes report boulders when they mean something else. The irresistible conclusion from all of the foregoing is that the dereliction at this point is attributable to some one whose training and experience and ready mind realized what would have been imported by the offer of evidence on the part of appellants of the existence in the Elk Hills of the very thing whose presence would absolutely refute the argument of appellants' leading expert against the oil character of the lands in suit. Counsel for appellants at the time of introducing the graphic logs and diagrammatic charts, exhibits 172, 173, 174, 175, 176 and 177, declared that it was not his purpose to introduce in evidence the original drilling reports from which it was claimed that these exhibits were made (R. 3157); and these daily drilling reports, as already indicated, were forced into evidence over the protest of counsel for appellants, the latter contending that they were private documents belonging to the Associated Oil Company and that he was not at liberty even to leave them with the Special Examiner (R. 3159-60).

It is not the intention of the government to question the good faith or integrity of counsel for appellants in the trial court. Counsel for the govern-

ment conceive it to be their duty to invite the attention of the court to the manifest inaccuracies and misrepresentations in the diagrammatic logs and charts in question and to the omission therefrom of many facts and circumstances reported by the drillers and contained in their daily drilling reports. That these inaccuracies, misrepresentations and omissions are proved by a comparison of the diagrammatic logs and charts with the original daily drilling reports is beyond question; and that the original daily drilling reports demonstrate the truth of the situation, namely, the rich mineral character of the lands in suit and the commercial character of the three deep wells under discussion, is likewise beyond question.

**UNSUCCESSFUL WELLS DRILLED IN THE ELK HILLS  
SINCE PATENT.**

Much was made by appellants of the fact that a number of wells were drilled in the Elk Hills in 1910 and 1911 that did not produce oil in commercial quantities. As already suggested, a few unsuccessful wells do not prove the non-mineral character of the lands. Dr. Branner testified that, while he could not, when he first examined the Elk Hills, have given "an assurance" that oil in valuable quantities could have been found, he could do so at the time of testifying on the basis of wells that had been put down there and found oil. He further stated that he would not hesitate to advise operators to go ahead with prospecting even if there had been twenty-eight wells drilled and indications of oil had been found

in only two of them, saying that it depended on how the wells were located. If put down without reference to the geologic structure, he said they might go to an enormous depth without getting oil, while they might move off to one side and put down a well within a thousand or two thousand feet and get entirely different results. He added: "The general structure of the Elk Hills is so favorable to the accumulation of oil in that region that, if they had gone to five thousand feet and not found oil, I should still advise a company to not give up hope of finding it." (R. 1008). This evidence was elicited on cross-examination and is here cited for the purpose of substantiating the statement that a few unsuccessful wells do not prove the non-mineral character of a large area, especially where there are successful wells—a matter of common knowledge.

The government admits that in 1910 and 1911 several wells were drilled along the fringe of the Elk Hills which were apparently unproductive and some of which were temporarily abandoned. Their failure, however, to find oil in commercial quantities throws no light whatever upon the question of the mineral character of the lands in suit which is abundantly otherwise proved. By unduly prolonging the discussion of unessential points the government could show from the testimony of numerous and unimpeachable witnesses that these wells were unsuccessful either because badly located with reference to the axis of the anticline or because drilled to an inadequate depth. As a matter of fact, in well nigh



every one of them gas and oil in greater or less quantities were encountered. Even appellants' leading expert, F. M. Anderson, admitted that these unsuccessful wells, which he had observed on the fringe of the hills and which were not in operation when he visited them, were removed from the axis of the anticline and all in very unfavorable positions and that this was true of those that were located on the anticline. (R. 2640-L.)

Much was said by appellants of the David Kinsey well on section 12 of 31-24. Kinsey himself testified that in it he got a showing of oil at 3700 feet and struck gas from 3700 to 4500 feet (R. 1795). He admitted that this well is on the eastern end of the hills (R. 1800) and it elsewhere appears that it is situated where the Elk Hills anticline is plunging rapidly downward and that, even if he had drilled to a depth of ten thousand feet, he might not have reached the oil-bearing sands. Section 12 of 31-24 is more than six miles distant from the nearest of the lands in suit. Appellants have much to say of unsuccessful wells drilled at great distances from the lands in suit, but are silent upon the large number of successful wells drilled nearer to the lands in suit than are the unsuccessful wells upon which they animadvert so freely. Like or similar conditions to those obtaining in the case of the Kinsey well might, if space permitted, be duplicated in the case of other unsuccessful wells; but the fact remains that in practically every one of them there was

at one depth or another a showing of oil, proving the dissemination of oil through the strata.

Four unsuccessful wells are particularly referred to on page 53 of appellants' "Brief Upon the Facts", which happens to be served on counsel for the government at almost the very moment at which the government's brief is in process of passing to the printer. It may be well, therefore, to give the court the benefit of certain information concerning these four unsuccessful wells not imparted in the brief of appellants. They rely upon their witness John Lang and his views are set out on page 84 of their brief.

With reference to the Redlands Oil Company's well on section 30 of 30-23 which was drilled to a depth of 2850 feet, Lang testified that gas was found at 520 feet and at 1050 feet a color of oil (R. 1954). At 1300 feet the derrick was burned by the ignition of gas produced from the well (R. 1956). Lang testified that the depth of this well was not sufficient to test the territory and that there is a possibility of oil in commercial quantity at greater depth (R. 1963). This is the well which appellants' witness, W. J. Luke, Jr., designated on his map as a dry hole (R. 2303); but he admitted on cross-examination that the log showed sixty feet of sandy shale with a showing of oil at a depth of 2720 to 2780 feet (R. 2306).

With reference to the Midway Pacific well on 32 of 30-23, which was drilled to a depth of 2425 feet, Mr. Lang says that it was not thoroughly tested and

that, if drilled deeper, would more thoroughly test the territory (R. 1963) and that they quit too soon to thoroughly test it (R. 1964-5). In this well the drillers found eighty feet of brown shale between the 1510-foot level and the 1590-foot level and the log of this well bore the notation "trace of oil and gas at 1536 feet". (R. 2314).

The Hillcrest Oil Company's well on section 28 of 30-23, 1670 feet deep, was, according to Lang, of insufficient depth (R. 1963). This is not an abandoned well nor is the territory abandoned, since the company still keeps a watchman there and still entertains the hope by drilling deeper of making a good well, the present obstacle in their way being a lack of funds. This is upon the authority of Mr. Lang (R. 1960). This is further stated by the Associated Oil Company's geologist W. A. Williams in the Visalia contest. The log of this well shows one hundred and seventy-eight feet of gas sand (R. 2311-12).

The Scottish Oil Fields' well on section 20 of 30-23 was not located upon the advice of a geologist, according to appellants' witness, T. M. Storke, who was one of the organizers of that company (R. 2045). This well found considerable gas at 2600 feet and thereafter (R. 2044). The well was started in November, 1910, and Storke testified that, since that was subsequent to the withdrawal orders of 1909 and 1910, if they had discovered commercial and paying quantities of oil before they pulled their tools from the well, they were uncertain as to the validity of any

title they might acquire from the government (R. 2045). Upon this point appellants' witness Lang also testified, saying that the fact that the government had withdrawn the land in the Elk Hills had something to do with their failure to go further with their locations, since it made it doubtful whether or not they could get title to the land. He said further: "The withdrawal, I think, has also had a tendency to discourage capital and has discouraged locators because of their inability to get capital interested." Moreover, the log of this well (Exhibit No. 11) shows seventeen feet of shale showing gas and oil (R. 1955). Lang also testified of his own knowledge that oil had been discovered on sections 26 and 30 and gas on sections 32, 30, 20, 28 and 26 of 30-23 and 30 of 30-24 (R. 1956).

Appellants have sought to create the impression that the Associated Oil Company, which drilled the three successful wells on sections 24 and 26 of 30-23 and on 30 of 30-24, has utterly abandoned these wells and the lands around them. As a matter of fact, this is not true and nothing is necessary to prove it beyond the testimony of appellants' own witness M. H. Whittier who was a director of the Associated Oil Company from 1902 or 1903 to 1910 and from 1911 to the time when he testified. He stated that he owned over ten thousand shares of capital stock of that company of the par value of a hundred dollars each (R. 1986). As stated, he was appellants' own witness. There can be no suggestion that he did not know of what he was talking. He testified that the



Associated Oil Company had not abandoned any of its property in the Elk Hills (R. 1987). This fact is further shown by the evidence of the government's witness J. W. Kingsbury who in April, 1913, examined the wells in question and took photographs of them which were introduced in evidence as exhibits 11-R, 11-S, 11-T, 11-U, 11-V, 11-W, 11-X, and 11-Y (R. 3682-6). Kingsbury testified that the gates of these wells were at that time locked with chains and all three of them were capped. He could hear gas escaping from the wells on sections 24, 26 and 30 (R. 3694). Men were working around the wells painting the boilers and fixing them up for the Associated Oil Company and none of the wells appeared to have been abandoned. They had merely the appearance of being closed down. From the well on 26 oil was coming out between the casing and running into the sump about three hundred feet away, the pressure on the gauge showing three hundred and twenty pounds. He estimated four hundred barrels of oil in the sump at that time. Other facts are set out in the record showing clearly that there was no abandonment, but a mere temporary cessation of work (R. 3695-6).

### CONCLUSION OF SUBSEQUENT DEVELOPMENT.

It is manifest that in 1910 and 1911 the Associated Oil Company drilled three highly successful and commercial wells in the Elk Hills. It is true that during the same period other wells were drilled in or near the Elk Hills which for one reason or an-

other did not prove successful. It is possible that in the case of the Kinsey well no amount of drilling might have encountered oil because of the plunge of the anticline and the consequent depth of the oil sands. Others were failures for the same reason. In most instances, however, failure was due to insufficient depth and consequent discouragement on the part of drillers to which the problem of title presented by the withdrawal and lack of funds were contributing elements. The fact of the non-success of these wells has not even a remote bearing upon the question of the mineral character of the lands in suit, while the three successful wells of the Associated Oil Company demonstrate that part of the Elk Hills is commercial oil territory.

The evidence of development subsequent to patent offered by appellants demonstrates the mineral character of the lands in suit. It is beyond doubt that the Associated Oil Company but for the withdrawal of September 27, 1909, would have been entitled to and could have secured patents based upon the discoveries which they made upon sections 24, 26 and 30. This would be true even if the wells drilled thereon had been as ghastly failures as appellants have attempted to represent them. None would have the temerity to suggest that the oil found in any of these three wells did not constitute a discovery. Necessarily, then, such discovery proved the mineral character of the land; for a mineral patent is based upon a discovery and it will not be denied that a mineral patent can be obtained only as to mineral

land. The foregoing propositions are not even debatable. Their soundness is self-evident.

The grant excepted mineral lands and made provisions for indemnity for losses within the primary limits occasioned by locations prior to selection by the railroad. It necessarily follows that the railroad could not secure patent to land upon which a qualified person had by discovery perfected a mineral location. If the Southern Pacific Railroad Company were to-day to file a selection list of lands within its indemnity limits upon which qualified persons had exactly duplicated the wells which appellants represent were drilled on the sections in question, it is not conceivable that it could succeed in securing patent over the protest of such persons. Unquestionably, such wells would preclude the issuance of an agricultural patent to the railroad; for, otherwise, there would be presented the paradox of the same land being open to acquisition by one party as mineral land and by another as non-mineral land. The wells on 24, 26 and 30 demonstrate the mineral character of the lands on which they are.

Both in the General Land Office and in the courts a discovery entitling its maker to a mineral patent is such a finding of mineral as would warrant a man of ordinary prudence in the further expenditure of money in the reasonable expectation of developing a paying property.

*Miller vs. Chrisman*, 140 Cal. 440; 197 U. S. 313.

Both in the Land Department of the government and in the courts it has been repeatedly held that a finding of mineral in commercial quantity is not necessary to a discovery.

*Castle vs. Wimble*, 19 L. D. 455

*East Tintic Cons. Min. Co.*, 43 L. D. 79

*Nevada Sierra Oil Co.*, vs. *Home Oil Co.*, 98 Fed. 673

*Book vs. Justice Mining Co.*, 58 Fed. 106

*Cascaden vs. Bartolis*, 146 Fed. 739

*Lange vs. Robinson*, 148 Fed. 799

*Miller vs. Chrisman*, *supra*.

The opinions in *Nevada Sierra Oil Co. vs. Home Oil Co.* and *Cascaden vs. Bartolis* were written respectively by Judge Ross and Judge Hunt of this court.

A discovery is the foundation of the right to a mineral patent. A mineral patent issues only as to mineral land. A finding of mineral in commercial quantity is not necessary to a discovery. Does it not inevitably follow that a finding of mineral in commercial quantity is not necessary to prove land to be mineral land?

Compare the requisites of a discovery with the test laid down by the Supreme Court in the *Diamond Coal & Coke Company* case for determining in advance of actual development what are mineral



lands. In the one case it is such a *finding or discovery* as will justify further expenditures in the reasonable expectation of developing a paying property. In the other it is *such known conditions as engender the belief* that one is justified in further expenditures. The common element is the justification of expenditures. It cannot have been mere chance that led the Supreme Court to adopt in the Diamond Coal & Coke Company case a standard similar to that which that court had approved as the requisites of a discovery. But it is to be remembered that among the known conditions was not included a discovery—the rule is not so strict as in the case of an application for a mineral patent. If, then, there has been a discovery upon lands, obviously those lands may not be acquired as non-mineral lands, since they are mineral lands. The wells on 24, 26 and 30 are beyond all question discoveries. Accordingly, the lands are not patentable as non-mineral lands.

To be sure, 24, 26 and 30 are not in suit; and there are no wells on the lands in suit. But the evidence as to these wells was offered by appellants upon the idea that it would prove the lands in suit non-mineral. If good for that purpose, though ineffective, it is both good and effective to prove the mineral character of the lands in suit.

By the line of argument last set out the government does not intend to concede that the wells in question are such as appellants have attempted to

represent them to be. On the other hand, it contends most emphatically and confidently that the record proves them commercially productive and commercially profitable wells. All that is intended is to show that, even if they were no more and no better than appellants would have them appear, they demonstrate the essential mineral character of lands adjoining the lands in suit and hence, instead of casting doubt upon the character of the lands in suit, justify the belief entertained by appellants in 1904 which led them to covet them and made them willing to perpetrate a glaring and reprehensible fraud in order to acquire them—as they also justify the belief of the Associated Oil Company evidenced by the large expenditures which it made in 1910 and 1911.

Respectfully submitted,

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## ADDENDUM.

Appellants' briefs were filed as the government's brief was passing to the printer and, therefore, too late to admit of answer herein. However, one position is taken or statement made by counsel for appellants which is the occasion of surprise. At three places in their brief entitled "Points and Authorities", namely, on pages 75, 94 and 128, appellants state that there was before patent and while the selection list was pending a hearing in the land office upon the question of the character of the lands in suit. On page 128 the statement is: "There was also a hearing in the Land Office after eight weeks' notice to the public" and reference is made to page 3860 of the record, an examination of which discloses, *not that there was a hearing*, but that, in accordance with a requirement of the Department of the Interior, a notice was published to the effect that protests or contests against the claim of the Southern Pacific Railroad Company to the lands in suit "on the ground that the same is more valuable for mineral than for agricultural purposes will be received and noted for report to the General Land Office at Washington, D. C."

The foregoing notice was published pursuant to a regulation of the Department of the Interior made July 9, 1894, which requires such notice when lands under selection "are found upon examination to be within a radius of six miles from any mineral entry, claim or location." 19 L. D. 21, 22. It is entirely clear that the record does not support the categorical

statement of counsel that there was a hearing in the instant case and that appellants are unable to show any distinction between the instant case and *U. S. vs. Minor*, 114 U. S. 233, 239, and *Washington Securities Co.* 1: U. S., 234 U. S. 76, 78, cited on page 94 of their brief and elsewhere herein. These cases are admitted by appellants to be authority for the position of the government that, to use their language, “*where the proceedings are purely ex parte, where no issue was framed, where no hearing was had, the findings by the patent are not conclusive*”; and appellants’ specious attempt to import into the instant case a hearing which is not even suggested in the record leaves the cited cases without differentiation.

*Tulare Oil & Mining Co. vs. Southern Pacific Railroad Co.*, 29 L. D. 269, is a case in which there was a hearing—with what result will be shown. This case was cited below upon another point by appellants, but is not mentioned in their briefs in this court. There the Southern Pacific Railroad Company had filed a selection list, similar to that in the instant case, to lands in the McKittrick district in 30-22. Protest was filed by the Tulare Oil & Mining Company and, in order to deceive the land office and suppress the true facts, negotiations were entered into by the Southern Pacific Railroad Company with the Tulare Oil & Mining Company as the result of which an agreement was entered into that the protest should not be urged, in consideration of which the railroad agreed to deed and did thereupon deed



to the Tulare Company several months before patent a certain portion of the selected land upon which oil was then being actually produced. That deed was executed by H. E. Huntington as president of the Southern Pacific Railroad Company February 21, 1900, (R. 449, 450, 1, 2 and 3); and the patent, No. 104, is dated May       , 1901. The foregoing facts, which are not contradicted, appear in the testimony of H. M. Shreve, vice-president and manager of the First National Bank of Tulare, California, and Secretary of the Tulare Oil & Mining Company. His testimony is brief and is found at pages 446 to 462 of the record.

The Tulare case is important for two reasons. It shows that, even where there is a hearing between rival claimants—and all of the cases cited by appellants on page 94 of their brief show by their titles that they were between rival claimants and that the government was not a party—, the government, not being represented, is afforded no protection and may be easily overreached by fraud and collusion. It also exposes the record of the Southern Pacific Railroad Company and demonstrates its entire willingness to acquire lands from the government in the very manner in which it acquired the lands in suit, viz., by fraud and misrepresentation and “without care as to the means” by which it profits at the expense of the public. Its conduct in the Tulare case gives more than color to its capacity and entire contentment to do the things with which it is charged in the instant case. Moreover, it is matter of serious

doubt whether, when there is a hearing between individual claimants, the findings are conclusive against the government. It is not a party and the binding effect of the finding would seem to be limited to the parties.











